BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CHRISTOPHER CLIFFORD, A.C.R.E.S. and COLLEEN COLE-BOWRON,	)	**SHB 92-52 and 92-53**
Appellants,	)	**ORDER GRANTING AND DENYING SUMMARY JUDGMENT**
v.	)	
CITY OF RENTON and THE BOEING COMPANY,	)	
Respondents.	)	
and	)	
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	
Respondent-Intervenor.	)	

Motions for partial summary judgment were argued on Wednesday, February 3, 1993 In addition, the following written materials were previously filed and considered.

1) Motion to Remand by ACRES & Cole-Bowron w/Declarations filed 1/15/93
2) Supplemental Declaration of Roger Leed, Declaration of Cole-Bowron, and Additional Motion to Remand filed 1/19/93.
3) Christopher Clifford's Motion to Reverse and Remand to the City of Renton for Reconsideration, filed 1/20/93.
4) Boeing's Request to Preserve Boeing's Right to Move for an Order in Limine, Motion for Partial Summary Judgment, and Memo in Support, filed 1/20/93
5) City of Renton's Motion and Brief for Summary Judgment, with Declaration of Ron Straka Filed 1/20/93.
6) Response to Boeing's Motion to Dismiss filed 1/27/93..
7) Response to Renton's Motion to Dismiss filed 1/27/93.
8) Response of City of Renton to Motions to Remand filed 1/27/93 .
9) The Boeing Company's Memorandum in Opposition to Motions for Remand

filed 1/27/93.

10) ACRES and Cole-Bowron's Response to the Boeing Company's Motion for Partial Summary Judgment filed 1/28/93.
11) ACRES and Cole-Bowron's Response to the City of Renton's Motion for Partial Summary Judgment filed 1/28/93.
12) Declaration of Colleen Cole-Bowron Regarding Lack of Notice of Threshold Determination filed 1/28/93
13) Declaration of David Scott Israel filed 1/28/93.
14) Declaration of Sally Leona Steiner filed 1/28.93.
15) Reply Brief to Response of ACRES and Cole-Bowron to City's Motion for Summary Judgment filed 1/29/93.
16) The Boeing Company's Reply to ACRES and Cole-Bowron's Response to Boeing's Motion for Partial Summary Judgment filed 1/29/93
17) The Boeing Company's Reply to Christopher Clifford's Response to Boeing's Motion for Partial Summary Judgment filed 1/29/93.
18) Response of Christopher Clifford to the City of Renton, and the Boeing Corp. Request for Denial of Summary Judgment filed 1/29/93.
19) ACRES and Cole-Bowron's Reply to the City of Renton's and Boeing's Responses to Motion to Dismiss filed February 1, 1993.
20) Declarations of David Scott Israel and Sally Leona Steiner filed February 2, 1993

Having considered the briefing, having heard oral argument, and being fully advised, we rule as follows:

I

ISSUES: Motions for summary judgment have been filed on the issues of:

1) notice, hearing and issuance of the shoreline permit, 2) requirements for water dependency and public enjoyment of the shorelines, 3) Renton's wetland ordinance, 4) requirements for categorizing the segment of Springbrook Creek at issue, and 5) jurisdiction to hear a challenge to compliance with the State Environmental Policy Act. In addition, respondents were granted until January 27, 1993, to inform the intervenor, Department of Ecology, if respondents will contest Ecology's factual determination that the flow of Springbrook Creek exceeds 20 CFS. Ecology having received no word by January 27, 1993, the issue should be determined as uncontested. We take these issues up in turn.

II

Notice, Hearing and Issuance of the Shoreline Permit. The parties have filed cross motions on these issues. After careful consideration of the steps taken by Renton, we conclude that its permit issuing process was proper and that summary judgment should be entered to respondents on these issues.

III

The Shoreline Management Act (Act) provides for public notice of shorelines permit applications in the following manner:

> *(4) Except as otherwise specifically provided in subsection (13) of this section, the local government shall require notification of the public of all applications for permits governed by any permit system established pursuant to subsection (3) of this section by ensuring that: . . .*
>
> *(a) A notice of such application is published at least once a week on the same day of the week for two consecutive weeks in a legal newspaper of general circulation within the area in which the development is proposed; and*
> *(b) Additional notice of such an application is given by at least one of the following methods:*
> *(i) Mailing of the notice to the latest recorded real property owners as shown by the records of the county assessor within at least three hundred feet of the boundary of the property upon which the substantial development is proposed;*
> *(ii) Posting of the notice in a conspicuous manner on the property upon which the project is to be constructed; or*
> *(iii) Any other manner deemed appropriate by local authorities to accomplish the objectives of reasonable notice to adjacent landowners and the public*
>
> *The notices shall include a statement that any person desiring to submit written · · concerning an application, or desiring to receive a copy of the final order concerning an*

application as expeditiously as possible after the issuance of the order, may submit the comments or requests for orders to the local government within thirty days of the last date the notice is to be published pursuant to subsection (a) of this subsection The local government shall forward, in a timely manner following the issuance of an order, a copy of the order to each person who submits a request for the order.

If a hearing is to be held on an application, notices of such a hearing shall include a statement that any person may submit oral or written comments on an application at the hearing. RCW 90.58 140(4) (emphasis added)

IV

Renton complied with the notice requirements of the Act by publishing and posting in the manner prescribed by the Act. As stated in both the Act and notices, persons desiring to submit written comments on the shoreline application were granted 30 days from the last date of publication, which was February 9, 1992. Appellants had this opportunity for written comment.

V

Under the Act, hearings by a local government on shoreline applications are optional, not mandatory. Save Flounder Bay, et al. v City of Anacortes and Mousel, SHB No 81-15 (1982) The Act requires only that if a hearing is held, notices shall include a statement that any person may submit oral or written comments at the hearing. RCW 90 58.140(4), supra.[1]

V

The permit issuance process specific to Renton is set forth as follows in its Shoreline Master Program (RSMP)

[1] The optional nature of these hearings is reiterated in the Renton Shoreline Master Program (RSMP) at §2 04 01(F), p. 8

> *Under the shoreline permit system herein established, administrative responsibility lies jointly with the Building and Zoning Department and the Policy Development Department, but the permits are reviewed in the event of dispute by the Land Use Hearings Examiner, who has the authority to approve or deny permit applications. Liberal provisions for appeal of permit decisions to the State of Washington Shorelines Hearings Board are also provided.* RSMP §1.03, p 2.

Renton's interpretation of this provision is that shoreline permits are approved or denied by a departmental administrator unless there is a dispute concerning the application between City departments. That is the interpretation which we make today. There is no evidence by affidavit or otherwise to support the existence of any dispute between City departments, concerning Boeing's shoreline application, during its processing by the City. The City's departmental administrator, Lynn A. Guttmann, was therefore the proper City official to grant or deny the Boeing shoreline application. The city's Land Use Hearing Examiner was not the proper official to grant or deny the shoreline application.

VI

In sum, Renton extended the statutory notice and opportunity for written comment, elected a lawful option to proceed on the written record without hearing, and accorded the final shoreline permit decision to the departmental administrator who, alone, had authority to decide. An appeal from that decision must be filed here. RCW 90.58.180.

VII

Notwithstanding the above, appellants urge that certain aspects of the notice and hearing conducted by the City's Land Use Hearing Examiner in May, 1992 warrant reversal and remand of the shoreline permit. We disagree.

VIII

It is noteworthy that Boeing's proposal, like many others, requires not only a shoreline permit but also approvals under the general zoning authority of local government. It was under this general zoning authority, and not the Shoreline Act or master program (RSMP), that the Hearing Examiner gave notice of and conducted a hearing in May, 1992. Appellants point to certain statements in the Hearing Examiners report which refer to the shoreline permit. Yet, as we have held, the authority to grant or deny the shoreline application was vested by the RSMP in the departmental administrator, and not the Hearing Examiner. Appellants' contention that the notice of the May, 1992, hearing is defective for failure to invite comment on the shoreline application must therefore fail. The Hearing Examiner had no jurisdiction to invite such comment nor render a final decision on the shoreline application. The notice, hearing and decision of the Hearing Examiner were relative to site plan approval under the City's zoning authority The City's shoreline authority lay with its departmental administrator who properly proceeded on a written record.

IX

Finally, appellants cite RSMP §7.08.01(F) for the proposition that the Hearing Examiner had a mandatory duty to approve the proposed landfill, prior to approval of the shoreline permit under RSMP §7.08 01 which provides:

> *Landfills shall be permitted in the following cases:*
>
> *A. For detached single family residential uses, when the property is located between two (2) existing bulkheads, the property may be filled to the line of conformity provided the fill does not exceed one hundred twenty-five (125) feet in length along the waters' edge and thirty-five (35) feet into the water, and provided the provisions of Section 8.02.02 through 8.02.05 are satisfactorily met; or,*

B. When a bulkhead is built to protect the existing perimeter land, a landfill shall be approved to bring the contour up to the desired grade; or,

C. When in a public use area, landfill would be advantageous to the general public; or,

D. When repairs or modifications are required for existing bulkheads and fills; or,

E. When landfill is required for flood control purposes; or,

F. Justification for landfill for any other purpose than those listed in subsections A through E above will be allowed only with prior approval of the Land Use Hearing Examiner.

RSMP §7.08.01, p. 31.

X

Neither side, at this stage of the proceedings, has established complete and uncontroverted facts from which we can reach an ultimate conclusion as to whether the proposed fill fits within RSMP §7.08.01(A) through (E) or, conversely, RSMP §7.08.01(F) Consequently, landfill issues should be preserved for trial and the appellants request for remand before trial should be denied.

XI

Summary judgment should be granted for respondents on the City's notice, hearing and issuance procedures, excepting the landfill issues which are preserved for trial. Because the landfill issues are preserved within issue no. 6 of the Pre-Hearing Order, summary should be granted for respondents on issues no. 1 and 2.

XII

Requirements for Water Dependency and Public Enjoyment of the Shorelines

These issues, water dependency and public enjoyment of the shorelines, relate to the ultimate

determinations to be made under the Act. At this stage of the proceeding, while certain facts pertinent to these issues may be agreed, the totality of the proposal and its effects have not been fully developed on this motion record. We choose, therefore, to exercise our discretion to deny summary judgment, and preserve these issues for trial. See 4 Orland and Tegland, Wash Prac: Se. 1, CR56, p. 538

XIII

Summary judgment should be denied on issues no 4 and 5 of the Pre-Hearing Order.

XIV

Renton's Wetland Ordinance. Renton's wetland ordinance took effect on April 18, 1992. The ordinance provides:

> *The ordinance will not apply to any project that has reached the threshold environment determination state (DNS, MDNS) or the preliminary draft environmental impact statement (PDEIS) stage as of the effective date of this ordinance.*

The Renton Municipal Code, 4-32-16, p. 44. The MDNS for Boeing's proposal became final on April 16, 1992, two days prior to Renton's wetland ordinance. The ordinance, by its own terms, does not apply to this proposal.

XV

We review shoreline permits for consistency with the Shoreline Management Act and the applicable shoreline master program. RCW 90.58.140(2)(b). Our authority does not extend to determining compliance with Renton's wetland ordinance as it is not a part of the shoreline master program (RSMP) approved for Renton by Ecology. See Posten v Kitsap County, SHB no. 86-46 (1987). We lack jurisdiction to consider the proposal's consistency with Renton's wetland ordinance, even were it to apply.

XVI

Summary judgment should be granted for respondents on issue no . 9 of the Pre-Hearing Order. Issues no. 7 and 8 should be stricken. If we had jurisdiction, we would grant summary judgment to respondent on issue no. 7 of the Pre-Hearing Order, also.

XVII

Categorizing the Segment of Springbrook Creek at Issue. The Ecology guidelines for developing shoreline master programs provide that:

> *In order to plan and effectively manage shoreline resources, a system of categorizing shoreline areas is required for use by local governments in the preparation of master programs.* WAC 173-16-040(4).

The RSMP, in response to the guideline, provides:

> *All shorelines of the City not designated as conservancy or natural are designated as urban.* RSMP §5.04 03, p. 22

The RSMP thus categorizes the segment of Springbrook Creek at issue as "urban." Renton has categorized the Creek.

XVIII

Appellants city Welchko v. City of Anacortes and Skyline Marina, Inc., SHB No. 79-45 (1980) for the proposition that a shoreline permit must be vacated if granted on a shoreline which has not been categorized. Yet that is not the case here. In Welchko, the shoreline had not be categorized. Here it has.

XIX

Appellants further contest the categorization provided by the RSMP on the grounds that it is a "catch all." We know of no authority, nor is any cited, which would prevent the use of

a "catch all" or residuary system. Indeed, that system within the RSMP was approved by Ecology when the RSMP was approved by regulation. WAC 173-19-2520

XX

Summary judgment should be granted for respondents on issue no. 13 of the Pre-Hearing Order.

XXI

Jurisdiction to Hear a - Compliance with the State Environmental Policy Act. The City first argues that we may not consider compliance with SEPA in this matter without the consent of all parties, citing RCW 43.21C.075(7). We disagree. The provision cited is a specialized form of review made available to all litigants regarding any type of governmental action or permit. Thus, the SEPA aspects of say, a school closure or a building permit could be reviewed here by consent, even though the school closure or building permit itself is beyond our purview.

XXII

In this case, we are asked to review a shoreline permit. These are within our jurisdiction. RCW 90 58.180. Because we review the shoreline permit itself, we have jurisdiction to consider the SEPA compliance which is supplementary[2] to the permit approval Coughlin v. City of Seattle and Condominium Builders, Inc., SHB No. 77-18 (1977) and King County Chap. v. City of Seattle and Department of Highways, SHB No. 11 (1973) This is consistent with SEPA which provides as a general rule, that:

> *Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.*
> RCA 43.21C.075(2)(a)

[2] SEPA's function is supplementary to other laws RCW 43 21C 030(1) and -060 Consequently, it is distinguishable from other substantive statutes, rules or ordinances such as Renton's Wetlands Ordinance

Consent of the parties is not necessary to review of SEPA compliance by this Board in conjunction with review of a shoreline permit action

XXIII

The City next raises the issue of whether appellants are barred from obtaining SEPA review here for failure to have exhausted an appeal within the City of Renton. For the reasons which follow, we agree that appellants are barred, contingent upon a further showing by the City regarding notice

XXIV

An appeal from a city SEPA determination to another office within a city is authorized by SEPA:

> *Agencies may provide for an administrative appeal of determinations relating to SEPA in their agency SEPA procedures* . . . WAC 197-11-680(3)(a), see also RCW 43.21C.075(3)

The term "agency" includes local governments such as cities. WAC 197-11-714. The City of Renton is therefore authorized to adopt SEPA procedures which provide an internal, administrative appeal. The City of Renton adopted this SEPA appeal procedure

> *1. Any agency or person may appeal the City's compliance with Chapter 197-11 WAC for issuance of the following:*
>
> *a) A Final DNS: The appeal of the DNS must be made to the Hearing Examiner within fourteen (14) days of the date the DNS is final Ordinance No. 3891, Section 4-2823, p 17 (emphasis added)*

As we have previously concluded, the MDNS for the Boeing proposal was final on April 16, 1993. Appellants did not appeal the City's final MDNS to the City Hearing Examiner within

the 14 days provided by ordinance. Rather, they awaited action on the shoreline permit, which was approved in October, 1992, and now seek review here of the shoreline permit and related SEPA compliance.

XXV

Within SEPA's appeal provisions it states:

> *If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an appeal procedure, such person shall, prior to seeking any judicial review, use such procedure if such procedure is available, unless expressly provided by state statute.* RCW 43.21C.075(4).

This is a requirement for exhaustion of administrative remedies. We conclude that it applies to this case.

XXVI

The statutory reference in RCW 43.21C.075(4), above, is to exhaustion of an "agency" (City) appeal prior to "judicial" review The use of the term "judicial", however, should not vary the principle involved where, in the specific area of shoreline permits, appeal lies to this State Board from City action as opposed to the more common review of city action by writ of review in a judicial forum. This is so for two reasons.

First, the function of this Board is, like a judicial forum, one of review over the SEPA actions taken below. Both the judicial branch and quasi-judicial boards are exempted, themselves, from SEPA compliance because of this review role Both judicial and quasi-judicial bodies are granted this SEPA categorical exemption under the heading of "Judicial Activity". WAC 197-11-800(12).

Second, this case involves a threshold "determination of nonsignificance" (DNS). That SEPA determination is made appealable, by SEPA, before the ensuing permit action. RCW 43.21C.075(a). We believe that the purpose of an early appeal on a DNS is to apprise the agency (City) of any impropriety, and to allow the agency (City) an opportunity to correct that impropriety before taking action on the permit. This was among the factors enumerated by the Supreme Court in Citizens for Clean Air v Spokane, 114 Wn.2d 20, 785 P.2d 447 (1990):

> *We explained the policies underlying exhaustion in Orion Corp. v. State, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985) and reiterated them in Friedman, 112 Wn.2d at 78. The exhaustion requirement 1) prevents premature interruption of the administrative process; 2) allows the agency to develop the factual background on which to base a decision; 3) allows the exercise of agency expertise, 4) provides a more efficient process and allows the agency to correct its own mistake; and 5) insures that individuals are not encouraged to ignore administrative procedures by resort to the courts.*

We conclude that RCW 43.21C.075(4)(text at XXV, above), does impose an obligation to exhaust local SEPA appeals before seeking SEPA review in shoreline appeals to this Board.

XXVII

The Supreme Court, in Citizens for Clean Air, supra, addressed the burden on a city to provide notice before claiming failure to exhaust a local SEPA appeal. The Court stated:

> *The record shows constructive notice of the appeals procedure. The procedure was available in a duly enacted ordinance. Moreover, Spokane published notice of the EIS.*

Thus, the City did not owe a duty to inform appellants of its appeals procedure. That notice was constructive due to its availability in the City ordinance. But the City did owe a duty to appellants to publish notice of the appealable SEPA document (an MDNS here and an EIS in Citizens for Clean Air) Unless notice of the MDNS was properly given by the City, the

exhaustion requirement would not apply

Wn.App 241, 617 P 2d 743 (1980)

XXVIII

The City has submitted a letter dated April 16, 1992, informing Boeing of the MDNS The letter shows a courtesy copy to Colleen Cole-Bowron, an appellant here. Ms. Cole-Bowron has submitted a declaration that she did not receive that copy While that presents a disputed question of fact, we do not deem it to be a material question We are cited to no authority, and know of none, which would require a city to notify citizens individually, by letter, of an MDNS Rather, the provisions for notice are found in the City's SEPA ordinance·

> *(A) Whenever the ERC of the City of Renton issues a DNS under WAC 197-11-340(2) . the ERC shall give public notice as follows*
>
> *1 If public notice is required for a nonexempt license, the notice shall state whether a DS or DNS has been issued and when comments are due.*
>
> *2 If no public notice is required for the permit or approval, the City shall give notice of the DNS or DS by*
>
> *a) Posting the property, for site-specific proposals; and,*
>
> *b) Publishing notice in a newspaper of general circulation in the county, city or general area where the proposal is located*
>
> Ordinance 3891, Section 4-2818(A) p. 13. (emphasis added)

A "DNS under WAC 197-11-340(2)" includes an MDNS such as that issued here. WAC 197-11-340(2)(a)(iv) and WAC 197-11-350. Because there is no public notice requirement for a shoreline permit which could apprise the public that comments are due on a DNS, we deem paragraph 1 of the ordinance to be inapplicable The applicable paragraph 2 requires posting and publishing.

XXIX

The city may file, by February 17, 1993, certificates of posting and publishing proving compliance with the notice requirements of its SEPA ordinance, above. Appellants may file by February 19, 1993, any declaration or proof in opposition. If there is no genuine issue of material fact concerning the City's compliance with SEPA notice requirements, summary judgment should be granted for respondents on issue no 12 of the Pre-Hearing Order and issues no. 10 and 11 should be stricken. Failing a conclusive showing by the City of compliance with the notice requirements of its SEPA ordinance, issues no. 10, 11 and 12 should advance to trial.

XXX

SHORELINE: It is uncontested that the flow of Springbrook Creek for the segment at issue, exceeds 20 CFS as referenced in the definition of "shoreline" at RCW 90.58.030(3)(d) Respondent, Boeing, earlier moved to dismiss these appeals based upon the contention that the Creek is not a shoreline, or, if so, a substantial development permit is not required That motion relied upon Ecology rules and the RSMP, and thus concerned matters outside the pleading. Such a motion is a motion for summary judgment. CR 12(b). With the Order

Denying Motions entered January 22, 1993, herein, and the 20 CFS issue now being uncontested, summary judgment on issue no 17 should be granted to the non-moving parties.

WHEREFORE IT IS ORDERED:

1 Summary judgment is granted for respondents on issues 1 and 2 of the Pre-Hearing Order.

2. Summary judgment is denied on issues 4 and 5 of the Pre-Hearing Order

3. Summary judgment is granted for respondents on issue 9 of the Pre-Hearing Order and issues 7 and 8 are accordingly stricken

4 Summary judgment is granted for respondents on issue 13 of the Pre-Hearing Order.

5. The City may file by February 17, 1993, certificates of posting and publishing consistent with this order. Appellants may file opposing declarations or proof by February 19, 1993. Summary judgment will be granted or denied, accordingly, on issues 10, 11 and 12 of the Pre-Hearing Order.

6. Summary judgment is granted for appellants and intervenor on issue 17 of the Pre-Hearing Order

DONE at Lacey, WA, this 10th day of February, 1993.

William A. Harrison
HONORABLE WILLIAM A HARRISON
Administrative Appeals Judge

SHORELINES HEARINGS BOARD

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

Annette S. McGee
ANNETTE S. McGEE, Member

(See Partial Dissent)
ROBERT V. JENSEN, Attorney Member

Nancy Burnett
NANCY BURNETT, Member

Mark Erickson By Dhz.
MARK ERICKSON, Member

Robert C. Schofield by Dhz.
ROBERT C. SCHOFIELD, Member

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CHRISTOPHER CLIFFORD; A.C.R.E.S.; and COLLEEN COLE-BOWRON,	)	
Appellants,	)	**SHB NOS. 92-52 and 92-53**
v.	)	**ORDER GRANTING STAY**
CITY OF RENTON; and THE BOEING COMPANY,	)	
Respondents.	)	

I

On March 29, 1993, the Shorelines Hearings Board ("Board") entered its Final Findings of Fact, Conclusions of Law and Order in this case. The decision remanded the Boeing Company's ("Boeing") substantial development permit to the City of Renton ("Renton") for the addition of four conditions. Otherwise, the decision granting the permit was affirmed by a vote of five to one.

II

The six Board members unanimously signed a concurring opinion which concluded that construction of the project, pending the hearing was unlawful. Clifford, A.C.R.E.S., and Cole-Bowron v. Renton and Boeing, SHB NOS. 92-52 and 92-53, 1 (March 29, 1993)(concurring opinion).

III

Mr. Clifford, on March 29, filed a Request for an Emergency Stay of Construction. The request was denied by the Board, by a vote of three to three, on March 31. That was the last day on the Board of Annette S. McGee.

IV

On April 6, 1993, Mr. Clifford filed with the Board a Request for Reconsideration of Denial for Stay, and Order for Stay of Construction.

V

On April 8, 1993, Harold S. Zimmerman, Chairman of the Board sent all the parties a scheduling letter for legal argument on the motion for reconsideration and order of stay. The letter set April 26, 1993 as the date for final filings, and provided that the Board would decide on the motion thereafter, on the written record.

VI

On April 1, 1993, Richard C. Kelley, became the duly appointed replacement for Annette McGee on the Board. He subsequently reviewed the Findings of Fact, Conclusions of Law and Order; the denial of the stay; and the legal materials submitted by the parties for and against the stay, and for reconsideration of the denial of of the stay; and participated in the Board's decision on reconsideration

VII

On April 27, 1993, Mr. Clifford, A.C.R.E S , and Colleen Cole-Bowron filed an appeal in King County Superior Court of the Board's order. Boeing and Renton cross appealed on April 28, 1993.

VIII

The substantial development permit issued by Renton contains the following proscription:

> *No construction permit pursuant to the Substantial Development Permit shall be issued until thirty (30) days after approval by the City of Renton Planning/Building/Public Works Department or until any review proceedings initiated within this thirty (30) day review period have been completed.*

IX

The Shoreline Management Act ("Act") mandates that shoreline permits

> *include provisions to assure that construction pursuant to a permit will not begin or be authorized until thirty days from the date the final order was filed as provided in subsection (6) of this section; or until review proceedings are terminated if the proceedings were initiated within thirty days from the date of filing as defined in subsection (6) of this section . . .*

RCW 90.58.140(5).

X

The Act was passed as a response to Initiative 43, and was approved both by the legislature and the voters of Washington RCW 90.58.930. Its overriding purpose was "to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines". RCW 90.58.020.

XI

Originally, the Act prohibited development pursuant to a shoreline permit until all legal proceedings and appeals were terminated under RCW 90.58.140(5). Laws of 1971, 1st Ex. Sess., ch. 286, §14, p. 1505. In 1976, the Act was amended to allow a party to an appeal from a Board proceeding to request a hearing before the superior court to allow construction on the project to commence, provided the court found that the "construction pursuant to such a permit would not involve a significant, irreversible damaging of the environment". Laws of 1975-'76, 2nd Ex. Sess., ch. 51, §1, p. 204. The amendment also authorized the court to impose a bond, in the name of the local government that issued the permit, as a condition of allowing construction to commence.

XII

This Board has jurisdiction to issue a stay to protect the fruits of appeal from its decisions. RCW 34.05.467 and .550(1). We are also mindful that the superior court can lift any stay by making the findings required under RCW 90.58.140(5)(b).

XIII

RCW 34.05.470(3) provides that the Board is deemed to have denied a petition for reconsideration, if within 20 days from the date of filing the petition, the Board does not either dispose of the petition or specify the date upon which it will act on the petition.

XIV

The Board does not grant the stay under RCW 34.05.470. That statute delays the commencement for filing for judicial review until the Board has disposed of the motion for reconsideration. The Board concludes that the motion was denied on April 26, 1993. The Board, however here has chosen to exercise its authority under RCW 34.05.550(1), which applies after judicial proceedings have been initiated. That statute provides that "unless otherwise precluded by law, the agency may grant a stay in whole or in part, or other temporary remedy."

XV

The dissent contends that the Board should deny the stay request because the petitioner, Mr. Clifford allegedly slept on his rights. Mr. Clifford had sought a stay in King County Superior Court before the hearing before the Board began. It was denied, because Mr. Clifford failed to join Boeing as a defendant, and because no public agency had joined in the request. Neither Mr. Clifford, nor Renton, which were parties to that proceeding, brought the fact of that litigation to the attention of the Board, until the Presiding Officer raised a question in an in camera meeting.

XVI

We cannot conclude that Mr. Clifford did not have good cause to immediately seek a stay of construction, after the Board rendered its opinion that it had authority to issue such a stay. Clifford, A.C.R.E.S., and Cole-Bowron v. Renton and Boeing, SHB NOS. 92-52 and 92-53, 2 (March 29, 1993)(concurring opinion). We are not aware of any case where this

Board has previously been requested to grant a stay. The Board has no regulations which address the matter of stays pending hearings. This is a case of first impression, in which this Board believes it does have such authority and chooses to exercise it. We believe that the uniqueness of having the parties proceeding to construct a project, which is seen by the Board on its site visit, during the hearing; in addition to the lack of any reported law on the subject, provided Mr. Clifford with just cause to raise this issue to the Board, as soon as he was aware that the Board had jurisdiction over it.

XVII

We respect the concern of the dissent that this decision not be a harbinger of the Board's allowing last-minute changes to the issues in a proceeding. That concern should be obviated by the fact that there are no reported contested cases before this Board where ongoing construction has occurred pending the Board's hearing.

XVIII

This is not a case in which the Board is required to weigh equities. The Act itself prohibits construction during our deliberations. If construction is allowed to proceed during that time, our proceedings become suspect for the potential to rubber-stamp the fait accompli that has occurred on the project. We believe we must protect against any inference that our decisions are influenced by such events. The import of the automatic stay provisions of the Act are clearly spelled out in a decision from the 9th Circuit Court of Appeals.

> *The Navy argues that the SMA permit has been issued. The City of Everett approved, with conditions, the Navy's shoreline permit application. The WDOE then reviewed and approved the permit, imposing some additional conditions. The WDOE'S approval constitutes a final order for purposes of either side appealing the decision to the Shorelines Hearings Board. Wash.Rev.Code §90.58.180.*
>
> *. . . However, the permit has not been "issued" for purposes of commencing construction pursuant to it. As required by the SMA, the permit expressly states that construction pursuant to it may not begin and "is not authorized" until all review*

> *proceedings have terminated. This stay extends through the term of the appeal to the Shoreline Hearings Board, but may be lifted by a court asked to review the Board's decision. Wash.Rev.Code §90.58.140(5). Thus, under Washington law the permit does not allow construction to begin while it is being appealed to the Board (emphasis added).*

Friends of the Earth v. U.S. Navy, 841 F.2d 927, 937 (9th Cir. 1988).

XIX

Based on the foregoing, the Board issues this

ORDER

No construction may proceed on the Boeing Customer Services Training Center, which is the subject of the shoreline permit issued by Renton, from the date of this order, unless and until authorized by King County Superior Court, pursuant to RCW 90.58.140(5)(b).

DONE at Lacey, WA, this 18th day of May, 1993.

SHORELINES HEARINGS BOARD

ROBERT V. JENSEN, Attorney Member

RICHARD C. KELLEY, Member

ROBERT C. SCHOFIELD, Member

BOBBI KREBS-McMULLEN, Member

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

DISSENTING OPINION ON RECONSIDERATION OF OPINION DENYING EMERGENCY STAY

The majority has reversed an opinion of this Board entered on March 31, 1993 which denied a request for an emergency stay of construction on the CSTC project. That earlier opinion was issued as a result of a request from Appellant Christopher Clifford, submitted after a majority of this Board, by a 5-1 margin, approved the project with a number of modest conditions. That approval still stands, pending cross-appeals in the Superior Court of King County. The Board's reconsideration and reversal of its previous denial of the stay at this late date is ill-advised, serves no public purpose and appears only to be an attempt by the majority to "make the point" that it has the authority to issue such an order. We concur that the Board does have, in the proper case, authority to issue such a stay to preserve the protections of the Shoreline Management Act. However, those circumstances do not exist in this case, and we dissent.

The majority opinion follows a narrow interpretative path in declaring that once a technical violation of the Shoreline Act is found, a stay must issue. This ignores the fact that this Board, in acting on questions of injunctive stays, acts as a court of equity. As such, the Board has a duty to consider factors beyond a rote application of the statute. To find otherwise sets the dangerous precedent of being bound to automatically issue a stay for violation of the statute, including where the resulting inequities are even greater than they are here.

It is well established that courts of equity should consider the conduct of the requestor, including the timing of the request, the equity in granting or denying the request and the benefit to be served by the injunction. The following are equitable

considerations ignored by the majority which we feel are essential in deciding this matter and which compel denial of the stay:

1. The Appellant Clifford had the opportunity to request a stay of construction at any time prior to commencement of the hearing on the merits. Such a motion would have been timely to preserve the status quo during the hearing, which is the proper role of a stay. Although Mr. Clifford was aware at least by December, 1992 that construction had begun, he did not include that issue in the pre-hearing Order nor did he request such a stay at any time during the hearing. His request came only after issuance of the decision by the Board and appeared to be triggered by the concurring opinion which spoke to the issue of construction during the appeal process. Mr. Clifford delayed bringing his request until after a stay would have any meaningful purpose. (Preservation of the status quo during consideration by the Board). Mr. Clifford has not shown why he could not or chose not to bring this motion earlier. Having failed to exercise this opportunity in a timely way, Mr. Clifford should not, as a matter of equity, be allowed to pursue it now. This was the feeling of three members, including the undersigned, who denied his request for an emergency stay of construction brought on March 29, 1993. Given the advanced construction and damages that could result from stopping the contractor, the inequities are even more pronounced now.

2. It is uncontroverted that the current construction is consistent with the Order issued by this Board in approving the shoreline permit. Since the purpose of a stay is to prevent irreparable harm pending a proceeding, we cannot comprehend any purpose that would be served by a stay. The Board has placed itself in the incongruous position of having approved the CSTC project and now issuing a stay against construction consistent with that approval.

3. There is no evidence that a stay is required to prevent harmful impacts to land, waters, wildlife, vegetation or other aspects of the environment. Those issues were

thoroughly considered by the Board during the hearing on the merits. The Board found that the project did protect the environment with certain conditions attached. Therefore, there is no environmental reason why the stay should be issued.

4. The issue of construction continuation or stoppage is now within the jurisdiction of the King County Superior Court. Since motions in that Court are pending on this very issue, it would be improvident for this Board, at this late date, to issue its own stay when the Court will decide the matter in the immediate future.

For the above reasons, we feel that the Board, as a court of equity, should decide that a stay at this point in the proceedings is untimely, unfair and serves no environmental or public purpose. Moreover, it would serve to complicate matters currently being considered by the Superior Court. We believe that the Board's authority to issue a stay in the appropriate circumstance would in no way be jeopardized by denying the request before us. We have previously asserted the Board's authority to issue such a stay and we see no reason to simply "make the point" in this inequitable fashion. For these reasons we dissent.

DONE at Lacey, Washington, this 18th day of May, 1993.

SHORELINES HEARINGS BOARD

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

Mark O Erickson
MARK O. ERICKSON, Member

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CHRISTOPHER CLIFFORD. A.C.R.E.S. and COLLEEN COLE-BOWRON,	)	**SHB 92-52 and 92-53**
Appellants,	)	
v.	)	**FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**
CITY OF RENTON and THE BOEING COMPANY,	)	
Respondents.	)	

This matter came on for hearing before the State Shorelines Hearings Board, William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Harold S. Zimmerman, Chairman, and Annette S. McGee, Robert V. Jensen, Robert C. Schofield, Mark Erickson and Bobbi Krebs-McMullen.

This matter is the request for review of a shoreline substantial development permit granted by the City of Renton to the Boeing Company.

Appearances were as follows:

1. Roger M. Leed, Attorney at Law, for appellants A.C.R.E.S. and Colleen Cole-Bowron.
2. Christopher P. Clifford, appellant, pro se.
3. Lawrence J. Warren, Attorney at Law, for respondent the City of Renton.
4. Richard E McCann and Laura N. Whitaker for respondent The Boeing Company.
5. Respondent State of Washington, Department of Ecology did not appear at trial.

The hearing was conducted at Renton and Lacey, Washington, from February 22, 1993 to March 3, 1993. In all, 8 days were devoted to the trial.

Gene Barker and Associates provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined. The Board viewed the site of the proposal in the company of Judge Harrison and the parties. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I

This matter arises on Springbrook Creek in the City of Renton. It concerns a portion of the former Longacres race track.

II

Springbrook Creek and the site in question lie within the Green River watershed of the Kent-Renton valley The valley has, over time, been transformed from an agricultural district to an urban landscape of office parks, warehouses and other commercial uses That transformation was aided in large measure by public works aimed at controlling flooding in the valley The Howard Hanson Dam, completed in 1972, now regulates the flow of water in the Green River Springbrook Creek also has been altered by channelization, dredging, construction of sills along its banks, and by the installation of pumps to direct its flow uphill to enter the Green River.

III

The site in question made its transition from farm to commercial use early in time with the establishment of Longacres in the 1930s. Horse racing was conducted there for many years. Recently, the Longacres property was purchased by the Boeing Company which terminated horse racing in September, 1992. Boeing now proposes to construct a "Customer Services Training Center" (CSTC) on the northern end of the former Longacres property.

IV

The purpose of the CSTC would be to provide specialized instruction to the pilots and other staff of Boeing's customers This would be done by computer aided flight simulation occurring in classrooms within a building Initial emphasis would be on the operation of the new model 777 airplane.

V

The site in question consists of approximately 50 acres lying south of Interstate 405, and bordered on the east by Springbrook Creek. The proposed development consists of the CSTC building which is a "T" shaped structure containing approximately 600,000 square feet on three floors. This would front on S.W. 16th Street. There would also be parking of approximately 880 spaces. The parking is purposely less than one parking space per user because of emphasis on the use of high occupancy vehicles. Between 900 and 1100 persons would be employed at the CSTC. Approximately 650 to 800 students (airline personnel) would be trained each week. Including the smaller service buildings and related parking, the CSTC proposal would cover approximately 15 acres of the 50 acre site. The balance, 35 acres, would constitute the grounds of the facility.

VI

The CSTC proposal also includes a stormwater drainage element consisting of a series of ponds and wetlands leading to a drain into Springbrook Creek. The drain would be at the same location as an existing drain used for the same purpose. The largest of the water bodies in this drainage system would be a lake of 3 1/2 acres. This would be located in the former infield of the horse racing track. A landscaping plan calls for the use of native place species in wetland areas.

VII

Development of the CSTC site would follow the demolition of approximately 27 barns located along the former back stretch and eradication of the race track itself, as well as removal of poplars planted along its edge. The former infield and areas along Springbrook Creek would remain as open space. The two would be linked by new open space in the former barn area.

VIII

Finally, the CSTC proposal includes a public walking trail along Springbrook Creek where it borders the site. It would be open to the public during daylight hours. The trail would be built by Boeing which would grant an easement to Renton. The trail would then be maintained by the City.

IX

Boeing applied to the City of Renton on January 21, 1992, for a shoreline substantial development permit for the CSTC proposal. Following public notice of the application, and issuance of a mitigated declaration of non-significance, Renton approved the shoreline permit on October 13, 1992. On November 12, 1992, appellants Christopher Clifford, A.C.R.E.S and Colleen Cole-Bowron filed requests for review of that approval with this Board. The Washington State Department of Ecology sought, and was granted, intervention as a party respondent. Boeing moved for an expedited hearing schedule, which was also granted.

X

The factual issues in this matter concern the impacts of the proposal with regard to a) floodplains, b) wildlife, c) wetlands and d) public access to shorelines. We now take these up in turn.

XI

Floodplains A floodplain is the area inundated when a water body, such as a creek, overflows its banks. Building development in a floodplain may affect the intensity of flooding elsewhere and, also, flooding may affect unplanned building development. Floodplain development is regulated accordingly.

XII

The standard reference for determining the location of floodplains is the mapping done by the Federal Emergency Management Agency (FEMA). While these maps are used in the national flood insurance program, their utility goes beyond insurance and encompasses the hazard — flooding — for which the insurance is written.

Likewise, the standard meaning given to flooding in this context is the "100-year flood" That is defined as a flood having a 1% chance of occurrence in any given year.

XIII

At the site in question, the FEMA maps establish that during a 100-year flood the water will reach an elevation of 16.4 feet.[1]

XIV

In the past, Springbrook Creek has been dredged with the spoils laid along its banks to form a sill. The lowest point in the sill at the site is 14.2 feet. Thus, the FEMA 100-year flood elevation predicts that Springbrook Creek would overtop its banks. The resulting floodplain would then take in virtually all of the 50 acre site in question.

XV

The FEMA maps were drawn in 1989 and have been available to all parties to this appeal. Renton required that the floor levels of buildings be two feet above the 16.4 foot

[1] Elevations are National Geodetic Vertical Datum, a uniform baseline for elevations.

elevation which is consistent with the FEMA mapping. Parking lots were required to be about one foot above the 16.4 foot elevation which is also consistent with FEMA mapping. To achieve the floor and parking levels, soil or gravel must be added to existing ground levels. Boeing has agreed to meet these requirements.

XVI

While requiring floor elevations consistent with FEMA floodplain maps, Renton simultaneously sought further floodplain information. Specifically, it engaged an engineering and stormwater consultant, R.W. Beck and Associates to examine the floodplain location at the site. In September, 1992, Beck submitted a report to Renton which Renton adopted in processing the CSTC shoreline permit application.

XVII

The Beck report differs from the FEMA floodplain determinations in these key respects. 1) while both are the result of computer modeling Beck used a "continuous" model while FEMA used "event" modeling, 2) Beck presumes that its detailed modeling of wetlands and topography was not available to FEMA. However, the cross sections used by FEMA were not available to Beck, 3) the pump capacity at the mouth of Springbrook Creek had increased from 875 cubic feet per second (cfs) to 1917 cfs since FEMA mapping, 4) additional cells were opened in a culvert where Springbrook Creek flows under Grady way since FEMA mapping and 5) the S.W. 16th Street bridge span over Springbrook Creek was widened from 36 feet to 60 feet since FEMA mapping. From these and other factors, the Beck report concluded that the 100-year flood elevation at the site was approximately 11 feet, not 16.4 feet as mapped by FEMA. Because 11 feet is below the 14.2 feet marking the low point of the sill along Springbrook Creek, there would be no floodplain on the site. As predicted by the Beck report, floods would be confined to the channel of Springbrook Creek.

XVIII

While each of the foregoing factors supports a lower flood elevation than FEMA, there are countervailing factors within the Beck report which cast doubt upon its usefulness, at this time, as a substitute for FEMA maps. The following language from the report illustrates this point:

> *"It should also be pointed out that, because of the relatively short record available, and that there was only one event in the 26 year period of record that the Green River significantly constrained the Black River Pump Station operation, there is uncertainty in the estimation of Springbrook Creek water surface elevations.*

and

> *It should be noted, however, that more recent hydrologic work completed by Northwest Hydraulic Consultants (NHC) for the City of Kent on Mill Creek basin indicated that the ESGRW [Beck] Plan hydrology may be underestimating peak flow rates The 100 year flood predicted by the HSPF model for the ESGRW [Beck] was based upon a study of 1961-87 By expanding the study period to include the severe flood events of 1990 and 1991, the HSPF model will likely predict higher peak flows as much as 20% higher than previously predicted." Beck report, Exhibit R-101, p. 5 (emphasis added).*

This acknowledgment that the severe flooding of 1990 and 1991 were not considered and prediction of 20% higher flows is consistent with other testimony. Mr. Benson, another stormwater consultant testified that the 100 flood plain elevation for the site ranges from 11 6 feet to 13.1 feet. The higher of these numbers is 20% greater than the 11 feet stated in the Beck report.

XIX

The Beck report was not submitted to Renton as a substitute for FEMA maps. It acknowledges on p. 8 of that report that:

"Preparing a FEMA letter of map revision to lower the regulated floodplain elevation to the results of the ESGRW [Beck] Plan offers significant advantages, primarily, reducing the quantity of fill material required for future building development. The City should consider the following items when deciding whether or not to pursue a FEMA letter of map revision. . . .

> *It is important to note that the future condition HSPF model assumes that the Kent regional detention and enhanced wetland facility (Kent Lagoons) is operational. This proposed facility is planned to provide significant flood flow attenuation. If it is not constructed, higher Springbrook Creek floodplain elevations than predicted under the ESGRW [Beck] Plan will result. Therefore, it is recommended that the Kent Lagoons project be operational prior to requesting a FEMA letter of map revision. Otherwise, the ESGRW [Beck] Plan hydrology and hydraulic models should be revised and evaluated considering that the Kent Lagoons facility is not operational.*

If this further caveat is applied to the 13.1 foot 100 year flood elevation cited in the previous finding, that elevation increases by another indeterminate amount. By its own terms, the Beck report does not state a flood elevation in view of existing conditions. We find that the Beck report was not prepared as a substitute for FEMA mapping nor would it, on the present evidence, suffice for that purpose.

XX

Despite the foregoing, Renton accepted the Beck report as a substitute for FEMA mapping, and thus found the site to be entirely out of the floodplain. On the present state of the evidence, the FEMA map correctly locates the floodplain as encompassing virtually the entire 50 acre site at issue.

XXI

The changes to site topography proposed in the CTSC development would include the addition of earth to raise the elevation of buildings and parking lots. There would also be excavation of earth to construct the lake, ponds, wetlands and drainages proposed. For the entire site, there would be a net excavation of at least 37,000 cubic yards.

XXII

At the 16.4 foot 100-year flood elevation which we have found applicable, the cumulative storage volume of flood waters is 109 acre feet before development and 143 acre feet after development. This represents an increase in flood storage capacity of 1.3:1 as a result of the proposed development.

XXIII

The peak discharges of stormwater runoff from the site to Springbrook Creek would be less after the proposed development than before. The increased stormwater storage capacity would lead to this result.

XXIV

Wildlife. There are essentially three wildlife habitats on the site. The meadow along Springbrook Creek is the first of these. It is notable as a foraging area for birds of prey such as hawks and owls. The former infield area of the race track is the next habitat. It supports waterfowl which graze on the mowed lawn. The last habitat consists of the former barn area. There the feeding of the race horses resulted in spilled grains and other feeds that were attractive to mice and common birds such as crows, pigeons, starlings and sparrows. The barns were also home to barn swallows which nested there in considerable numbers.

XXV

The meadow by Springbrook Creek harbors "voles", a native mouse-like mammal. The voles feed on grasses and, in in turn, are food for birds of prey such as the red-tailed hawk. Red tailed hawks perch just off the CSTS site in surrounding trees to forage in a greater area which includes the meadow on the CSTC site. Neither the red-tailed hawk nor any other species commonly seen on or near the CSTS site is sensitive, threatened or endangered. Red-tailed hawks are well adapted to living in built-up areas. The chief ingredients to their success would be the retention of perching habitat along Springbrook Creek and vegetation suitable to their food source, the vole. Both of these are proposed by Boeing. The major perching trees will be left in place. Nesting habitat would be increased by tree plantings. While there may be fewer grassland voles, news species of mammals will appear in the wetlands to be created near the Creek. These would include the wetland vole. While the value of the CSTC site for hawk and owl foraging and nesting may not improve as a result of the proposal, that value is unlikely to be diminished by the proposal. Trees which are suitable for perching and nesting by hawks and owls should be emphasized in any development plan.

XXVI

Very occasionally, bald eagles are sighted in the vicinity of the proposal. They forage on the site, and do not nest there. Eagles also have developed some tolerance for human activity within their foraging grounds. The proposal is unlikely to have a significant effect on the infrequent foraging by eagles on or near the site.

XXVII

Springbrook Creek is suitable as habitat for beaver. Although mostly useful as a transportation corridor, one or more beavers have built a dam adjacent to the CSTS site. Being active at night, beaver show tolerance for human activity. The proposed planting of

wetland vegetation of the CSTS site would improve feeding habitat. The proposal is unlikely to have any adverse effect upon the suitability of Springbrook Creek as beaver habitat.

XXVIII

In the former infield, the mowed lawn represents a generally attractive habitat for grazing waterfowl such as Canada geese and various species of ducks. The proposal would retain about half of the infield as open habitat. The balance of the infield would become a lake surrounded on its margins with native wetland vegetation. While this constitutes a different waterfowl habitat from the portion of the mowed lawn it replaces, there is nothing in the evidence to suggest that it would be less attractive to waterfowl. To the contrary, it is probably an improved habitat from the standpoint of food variety, while offering greater protection from disturbance. This protection would be enhanced by minimizing walking trails in the lake and wetland areas.

XXIX

In the barn area, the decision by Boeing to end horse racing will also end the horse feeding that incidentally supported the mice and common birds. The removal of the barns would deny that location for swallow nests. Neither of these impacts are particularly significant to wildlife conservation. Since this habitat was artificial, a certain amount of artificial replacement habitat is being proposed in the form of ledges under walkway bridges for swallow nesting and boxes for other bird nesting.

XXX

The CSTS proposal would improve or retain wildlife habitat for all but common species dependent on spilled horse feed. The overall effect would be to improve wildlife habitat that fosters the long term well being of a greater variety of wildlife.

XXXI

Wetlands. The term "wetland" does not have a single, universally agreed definition. Under the Shoreline Management Act the term equates to "floodplain" on the facts of this case. However, neither the floodplain nor the entire site is wholly wetland in the definition of wetlands given by U S Army, Corps of Engineers. The Corps definitions are currently the standard most universally used to locate wetlands which function as such for habitat and biofiltration of storm waters.

XXXII

The U.S. Army, Corps of Engineers has, in turn, two definitions of wetlands. Each is contained in a manual, one published in 1987 and the other in 1989. The 1987 manual refers to plants, soils and water. The 1989 manual refers to the same parameters but requires only the existence of two out of three. Thus the 1987 manual can determine less area as wetland than the 1989 manual.

XXXIII

Under the 1987 manual, the pre-proposal condition of the 50 acre site includes 6 acres of wetlands. Under the 1989 manual pre-proposal condition is 14.5 acres of wetlands. Boeing's CSTC proposal would result in 14.99 acres of wetlands on the site under either manual.

XXXIV

The existing drainage from the site involves an open ditch running easterly across the site and discharging into Springbrook Creek from a 36" culvert. That ditch also drains large areas of land to the west of the site. The current Longacres parking areas drain from the site to Springbrook Creek without passing through wetlands.

XXXV

The Boeing CSTC proposal would establish a series of water bodies and water courses flowing easterly, but occupying almost the entire southern half of the site. This wetland network would function as a biofiltration system for site runoff, including the runoff from parking lots which would be routed there before entry into Springbrook Creek. Discharge to the Creek would be through the same size culvert at the same location as presently used.

XXXVI

The wetland network proposed by Boeing would have a natural appearance. At the suggestion of agencies with expertise, including the Washington State Department of Ecology, Boeing proposed the planting of native plant species in wetland areas. The plantings are selected to provide a variety of types including grasses and reeds growing low to the ground, bushes which would grow to intermediate height and trees which would grow higher yet. This will result in considerably greater plant variety and quantity than now exists on the site. The functional value of the wetland areas will increase for both habitat and biofiltration of storm waters.

XXXVII

The water quality of Springbrook Creek is not good. Levels of fecal coliform are high. Nitrogen levels and are also high. Many properties drain to Springbrook Creek, including the site in question and dairy farms located upstream. There was no water quality protection from manure when Longacres was operating. By contrast, the waste from the CSTC proposal with the greatest potential to harm water quality would be oil dripping from cars on its paved parking lot. This oil would be collected in catch basins in the parking lot. There would be double the usual number of such basins. From there, storm water would be routed to two settling ponds in the wetland area. These would settle out other pollutants which sink to the

bottom. The third stage of water pollution control is the lake to which waters are routed for further settling of pollutants. Lastly, storm waters are biofiltered through the wetland "delta" on route to the present point of discharge. The proposal would improve the water quality of runoff from the site compared to existing and past conditions.

XXXVIII

Herbicides and pesticides are not proposed for wetland areas. To the extent that such herbicides or pesticides may be used outside wetlands but migrate into wetlands, their effect will be mitigated by the pond and delta system. That system will allow pesticides to bond to other particles and settle out.

XXXIX

An aeration system is also proposed for the lake and ponds which will improve the water's oxygen content. The sound of the aeration pumps is unlikely to disturb wildlife significantly.

XL

The contribution of improved water quality going from the site to Springbrook Creek will enhance, in at least a small way, the quality of Springbrook Creek itself. The Creek is a passageway for salmon which move up it to spawn in tributaries. The improved water quality of the runoff from the proposal will contribute to cleaner waters for this fish habitat.

XLI

The CSTC proposal will increase total wetland area. It will also increase the functional value of that wetland for wildlife, fish and water quality.

XLII

The trail along Springbrook Creek, which is part of the CSTC proposal, will provide public access to the shorelines of the state. That access is in

contrast to the existing and past policies of closing the shore of Springbrook Creek to the public. During the operation of Longacres the public was not admitted to that shoreline.

XLIII

The trail proposed by Boeing is a segment in the greater Renton trail plan. The trail proposed for this site is consistent with that plan. It is one step in a greater effort to bring even more access to shorelines by connection with other trails. Because trails are built in segments as development is approved for successive sites, the trail will initially begin and end on the site pending linkages in the future. That, however, does not detract from the benefit of taking this first step in a trails system.

XLIV

Public access depends, even for foot trails, on parking. Parking for the public is now situated only at remote locations, and on S. W. 16th Street under as yet unformed on-street parking limits. The provision of a few on-site parking spaces for members of the public who desire to walk the public trail would enhance the object of public access to the shorelines

XLV

Public access trails must not harm what the public comes to see. In this case, the proposal would afford to the public a view of an attractive shoreline area with a variety of wildlife. The public trail as proposed is at ground level, however, and would impede the passage of wildlife, including voles. The trail would be less intrusive if made of wood and elevated. This would be a contribution toward assuring that other wildlife, such as red-trailed hawks, would be seen by visitors.

XLVI

The public trail proposed for the CSTC site would provide substantial public access to a shoreline of the state, Springbrook Creek.

XLVII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

We review the proposed development for consistency with the applicable shoreline master program and the Shoreline Management Act. RCW 90.58.140.

II

SHORELINE MASTER PROGRAM. The applicable shoreline master program is that adopted by the City of Renton. The Renton Shoreline Master Program (RSMP) designates this shoreline of Springbrook Creek as "urban", and we have so ruled by summary judgment.[2] All uses are permitted within this environment, subject to use regulations. RSMP §5.04 02 at p 22. The proposed CSTC development, a commercial use, is therefore a permitted type of land use at the site in question.

III

The RSMP goes on to state use regulations, goals and policies with regard to permitted uses. A number of these are at issue.

IV

Landfill. Landfill is defined in the RSMP as follows:

> *Creation or maintenance of beach or creation of dry upland area by the deposit of sand, soil, gravel or other materials into shoreline areas.* (Emphasis added). RSMP §9.19 at p. 44.

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[2] Order Granting and Denying Summary Judgment entered February 10, 1993, at XVII, page 9

V

We have found that virtually the entire site is floodplain. Finding of Fact XX, supra. In turn, a floodplain constitutes a "wetland" under the RSMP definition:

> *Wetlands or Wetland Areas: Those lands extending landward for two hundred (200) feet in all directions, as measured on a horizontal plane from the mean high-water line, and all marshes, bogs, swamps, floodways, river deltas, and floodplains associated with the streams, lakes and tidal waters which are subject to the provisions of the Act.* (Emphasis added.) RSMP §9.44 at p. 46.

VI

Applying both the definitions of "landfill" and "wetlands" as set forth in the RSMP to the facts of this case, we conclude that the proposed addition of earth, throughout the entire site, constitutes landfill. That is because the addition of earth creates dry upland area from the type of wetland known as a floodplain.

VII

The City of Renton contends that there can be no creation of dry upland area because the site is not in a floodplain. We disagree. Renton's determination that the site is outside the floodplain was erroneous.

VIII

Renton also urges that wherever, as here, the quantity of earth excavated exceeds the quantity of earth added, there is no landfill. We disagree here also. The creation of dry upland, hence landfill, is occurring in the areas where earth is added. While a net comparison of fill to excavation is appropriate in assessing the propriety of the landfill, it cannot prevent the conclusion that landfill is occurring.

IX

Section 7.08 of the RSMP at p 31 provides as follows, in pertinent part:

Landfill

Landfills shall[3] be permitted in the following cases:

A. . . .
B. . .
C. When in a public use area, landfill would be advantageous to the general public, or,
D. . .
E. When landfill is required for flood control purposes; or,
F Justification for landfill for any other purpose than those listed in subsections A. through E. above will be allowed only with prior approval of the Land Use Hearing Examiner.

X

From the foregoing, appellants urge that the fill in this proposal should have been considered by the Renton Land Use Hearing Examiner. We disagree. The fill proposed in the CSTC application included the underlayment of the paved public access trail. This fill would be within a public use area and advantageous to the general public. It would fall under §7.08 C. The fill proposed for berms which shield the parking lot from the view of persons on the public trail is similarly within §7.08 C. The remaining fill proposed on the greater CSTC site was devised to elevate buildings, parking lots and other structures above flood levels or to buttress these against flooding or to direct the subsidence of flood waters in an orderly manner. The remaining fill is required for flood control purposes, and comes under

[3] Despite the use of the word shall, we conclude that the purpose of the above provision is to enable Renton to determine how landfill proposals in the City are to be reviewed, not whether or to what extent landfilling shall be permitted under other sections of the RSMP or the Shoreline Management Act.

§7.08 E. It is noteworthy that §7 08 E. does not, as suggested at one point in the evidence, refer to flood control "projects" of the type government might build. Rather, it refers to flood control "purposes" which was the purpose here.

XI

Because the proposed landfill falls within §7.08 C. and E. of the RSMP it is a type permitted without consideration by the Renton Land Use Hearing Examiner. Because of this the consideration of landfill was properly a matter for the Renton departmental administrator, who granted the shoreline permit at issue.

XII

Landfill within §7.08 C. and E. must, however, meet other use regulations within the RSMP. A general regulation applicable to all developments, §6.02.01 of the RSMP at p. 23, provides:

> Pollution and Ecological Disruption.
>
> *The potential effects on water quality, water and land vegetation, water life and other wildlife (including, for example, spawning areas, migration and circulation habits, natural habitats and feeding), soil quality and all other environmental aspects must be considered in the design plans for any activity or facility which may have detrimental effects on the environment.*

XIII

Landfill in a floodplain is not prohibited by the above §6.02.01, or otherwise. What is required by §6.02.01 is a consideration of environmental aspects. In the context of landfill within a floodplain, that landfill must not reduce the floodwater storage of the site so as to cause the diversion of floodwaters to other sites. In this case, the Boeing CSTC proposal would increase, not reduce, the floodwater storage capacity. The peak discharge of

stormwater runoff should not increase so as to intensify flood effects elsewhere. Here, the Boeing CSTC proposal would decrease peak discharges of stormwater runoff. The elevations of structures should assure their safety during flood events. Here, the Boeing CSTC proposal would elevate floor levels and parking levels above the floodwaters as predicted for the 100 year flood by FEMA mapping.

XIV

The landfill proposed for the CSTC site, virtually all of which lies within the floodplain, is unlikely to have any detrimental effect with respect to flood waters, and is consistent with §6.02 01 of the RSMP.

XV

Wildlife. Section 6.01.02. text at Conclusion of Law XII, supra, also applies to the effects of the proposal on wildlife. The overall effect of the Boeing CSTC proposal would be to improve wildlife habitat. However, two alterations to the proposal are necessary to assure compliance with §6.02.01. First, the protection afforded to wildlife by the proposal should be enhanced by the elimination of certain private trails in the wetland areas. Second, the planting scheme must include native trees suitable by size and type for raptor perching. With these specifications, the CSTC proposal is consistent with §6.02.01 with respect to wildlife. The same is true with respect to §6.07 requiring protection for unique and fragile areas, including wildlife habitat.

XVI

Wetlands The Boeing CSTC proposal will increase total wetland area, and increase the functional value of that wetland. With respect to wetlands, drainage, plant variety and water quality the proposed development is consistent with §6.02.01. The proposed development is also consistent with §6.07 with regard to wetlands as a fragile area.

XVII

Public Access Regarding public access the RSMP provides at §6.04 01 at p. 24:

> *Where possible, space and right of way shall be left available on the immediate shoreline so that trails, non-motorized bike paths, and/or other means of public use may be developed providing greater shoreline utilization.*

The proposed public trail along Springbrook Creek will provide shoreline access for substantial numbers of the people to enjoy that shoreline of the state. The Boeing CSTC proposal is consistent with §6.04.

XVIII

Regarding public parking for public use of shorelines, the RSMP provides at §7.11.01 at p. 32:

> *A. In order to encourage public use of the shoreline, public parking is to be provided at frequent locations.*

Because of the remoteness of public parking associated with as yet unconnected trail segments, and because of unformed on-street parking limits, a limited number of public parking spaces should be provided on the northeast corner of the CSTC parking lot. Access should be provided from those public parking spots to the public trail, and marked by appropriate signs. With this alteration, the proposed development would be consistent with §7.11.01.

XIX

Both public and private parking are discouraged by the RSMP along the water's edge. Sections 7.11.01 and 7.11.02. Although the proposed parking is within 200 feet of Springbrook Creek, it is away from the water's edge. The CSTC parking is consistent with RSMP §§7.11.01 and 7.11.02.

XX

The provisions of RSMP §6 02.01, text at Conclusion of Law XII, supra, also apply to the public access trail. We have noted the need for balance between a public trail and the natural aspects of the shoreline, including wildlife, which the public comes to see. For this reason, the proposal should be altered to provide that the public trail be elevated and constructed of wooden materials for the enhancement of wildlife habitat. With this alteration, the proposed development would be consistent with §6.02.01.

XXI

Other Aspects of the Proposed Development. The nature of the proposal as commercial development subjects it to §7.05.01 of the RSMP at p. 28. This provides, pertinent part:

> Location of Developments
>
> A. New commercial developments are to be encouraged to locate in those areas where current commercial uses exist.
>
> B. . .
>
> C. Commercial developments should incorporate recreational opportunities along the shoreline for the general public.
>
> D. The applicant for a shoreline development permit for a new commercial development must indicate in his application the effect which the proposed commercial development will have upon the scenic view prevailing in the given area. Specifically, the applicant must state in his permit what steps have been taken in the design of the proposed commercial development to reduce to a minimum interference with the scenic view enjoyed by any significant number of people in the area.

XXII

The Boeing CSTC proposal was made for an area where there was current commercial use, namely, the Longacres race track. The proposal includes a public access trail providing recreational opportunities along the shoreline. There has been no evidence showing interference by the proposal with any scenic view. The proposed development is consistent with §7.05.01 governing commercial development. It is also consistent with §7.05.02 governing setback.

XXIII

The proposed development is also consistent with RSMP §6.05 requiring that facilities which do not require a water's edge location be placed inland. Here the principal development is set back, inland of a public right of way. The proposed development is also consistent with §6.03 concerning use compatibility and aesthetic effects.

XXIV

Appellants cite the policies for the urban environment appearing in the RSMP. In particular, §5.04 01 C. at p. 22 which provides:

> *Water Dependent Activities. Because shorelines suitable for urban uses are a limited resource, emphasis shall be given to development within already developed areas and particularly to water dependent industrial and commercial uses requiring frontage on shorelines.*

The context of this language is one of general policy. Both this and the wording "emphasis shall be given" establish that placement of water dependent commercial uses is an aspirational goal, and not a binding requirement of the RSMP. Neither this policy nor the use regulations

of the RSMP which implement it prohibit shoreline development which, like this proposal, is not water dependent. The Boeing CSTC proposal is consistent with §5.04 01 C.

XXV

Appellants further cite §4.01.02 B., at p. 14, a policy of the RSMP which states:

> *Those shoreline uses or activities which are not water related should be encouraged to relocate away from the shoreline.*

The term "water related" is defined to mean.

> *Water Oriented or Water Related: Referring to uses, activities or facilities which are not necessarily water dependent but still incorporate in their design some kind of advantageous use of the water, for example, walkways or view windows.* RSMP §9.43 at p. 46

The Boeing CSTC proposal, though not water dependent, incorporates in its design a public shoreline walkway. The proposed development is therefore water related and consistent with §4.01.02 B.

XXVI

SHORELINE MANAGEMENT ACT. For each of the reasons set forth above concerning consistency with the RSMP, the Boeing CSTC proposal is consistent with the policy of the Shoreline Management Act (SMA), at RCW 90.58.020, in that it does protect against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life.

XXVII

Appellants contend that the proposal is required to be water dependent. In fact it is not. Neither is it required to be by the policy of the SMA. That policy, at RCW 90.58.020 states:

> *In the implementation of this policy the public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state shall be preserved to the greatest extend feasible consistent with the overall best interest of the state and the people generally. To this end uses shall be preferred which are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline. Alterations of the natural condition of the shorelines of the state, in those limited instances when authorized, shall be given priority for single family residences and their appurtenant structures, ports, shoreline recreational uses including but not limited to parks, marinas, piers, and other improvements facilitating public access to shorelines of the state, industrial and commercial developments which are particularly dependent on their location on or use of the shorelines of the state and other development that will provide an opportunity for substantial numbers of the people to enjoy the shorelines of the state.*

This policy identifies three categories of shoreline use to which the SMA will afford priority The first is single family residences. The second is water dependent use. The third is use which affords public access, or access for substantial numbers of the people, to the shorelines. Each of these three categories of use is of equal dignity under the SMA. See Eastlake Nos. 90-8 and 90-9 (1990), aff'd 64 Wn. App. 273 (1992). A proposed development is entitled to priority when it is within one of these three categories of shoreline use. Nothing in the policy of the SMA requires that a development must also be within the other two categories to achieve priority. Thus, the SMA does not call for mandatory water dependent use. James T. Smith v. City of Seattle and New England Fish Company, SHB Nos. 158 and 158A (1974). See also Department of Ecology v. Ballard Elks,

94 Wn.2d 551 (1974). Thus, the Boeing CSTC proposal, though not a single family residence or water dependent use, is entitled to priority because it is a use which affords public access to the shorelines. We conclude that the proposed development is consistent with the policy of RCW 90.58.020 of the SMA.

XXVIII

We have carefully reviewed appellant's other contentions and find them to be without merit.

XXIX

SUMMARY The Boeing CSTC proposal is consistent with the Renton Shoreline Master Program and the Shorelines Management Act provided that the following four conditions are required. Each is based upon the evidence herein, and is necessary to compliance with the RSMP and SMA:

1. The private trails in or adjacent to wetlands areas marked on Appendix A hereof shall be eliminated. This condition does not prohibit access for normal maintenance and repair.

2. The planting scheme shall include native trees suitable by size and type for raptor perching.

3. Twenty public parking spaces shall be designated in the northeast corner of the CSTC parking lot. Access shall be provided from these spaces to the public trail and shall be marked by appropriate signs.

4. The public access trail shall be elevated from the ground, shall be constructed of wood, shall not involve the use of polluting preservatives, and shall be ramped for access by the disabled. The requirements of this condition do not apply to private trails.

XXX

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

From the foregoing, the Board issues this:

ORDER

The shoreline substantial development permit for the CSTC proposal is remanded to the City of Renton with instructions to amend it by addition of the following conditions:

1. The private trails in or adjacent to wetlands areas marked on Appendix A hereof shall be eliminated. This condition does not prohibit access for normal maintenance and repair.

2. The planting scheme shall include native trees suitable by size and type for raptor perching.

3. Twenty public parking spaces shall be designated in the northeast corner of the CSTC parking lot. Access shall be provided from these spaces to the public trail and shall be marked by appropriate signs.

4. The public access trail shall be elevated from the ground, shall be constructed of wood, shall not involve the use of polluting preservatives, and shall be ramped for access by the disabled. The requirements of this condition do not apply to private trails.

As so amended, the permit is affirmed.

DONE at Lacey, WA, this 29th day of March, 1993.

William A. Harrison

HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

SHORELINES HEARINGS BOARD

Harold S. Zimmerman

HAROLD S. ZIMMERMAN, Chairman

Robert V. Jensen

ROBERT V. JENSEN, Attorney Member

Annette S. McGee

ANNETE S. McGEE, Member

(See Dissenting Opinion)
BOBBI KREBS McMULLEN, Member

Robert C. Schofield By 2053

ROBERT C. SCHOFIELD, Member

Mark Erickson

MARK ERICKSON, Member

CONCURRING OPINION

The posture in which this case came before the Board is disturbing. Boeing was engaged in construction of the CSTC main building, when the Board took its site visit on the first day of the hearing

We have been unable to find any law which would allow the commencement of construction of this project pending review by the Board.

RCW 90.58.140(5), mandates that shoreline permits

> *shall include provisions to assure that construction pursuant to a permit will not begin or be authorized until thirty days from the date the final order was filed as provided in subsection (6) of this section; or until review proceedings are terminated if the proceedings were initiated within thirty days from the date of filing as defined in subsection (6) of this section ...*

IV

The permit issued by Renton contains an identical proscription. The Board has concluded that nearly the entire CSTC project lies within the 100 year floodplain, and therefore within the wetlands of Springbrook Creek. Even had the Board decided, however, that the landward limit of the shoreline were a line parallel to the creek, 200 feet upland of the ordinary high mark of the creek, present construction of the CSTC building (which is just outside of such a line) is not authorized under the Shoreline Management Act. This is because all of the CSTC development, which is planned to occur within 200 feet of Springbrook Creek, would not have been contemplated, were it not for the CSTC development located upland of and adjacent to this 200 foot area.

V

Merkel v Port of Brownsville, 8 Wn. App. 844, 851-52, 509 P 2d 390 (1973) is a landmark case, which clearly enunciated the rationale for the prohibition of construction of any

portion of an "integrated project" (one which falls both within and without the areas the Act defines as shorelines of the state).

VI

Despite the clear law on this point, none of the parties to this litigation, including Boeing, Renton, or Ecology, brought the Board's attention to the fact of ongoing construction of the project, prior to the commencement of the hearing. After the hearing began, the pro se appellant was critical of the pending construction, in his opening and closing statements. However, neither he, nor any of the other parties ever requested this Board for relief, by way of a stay.

VII

This Board, as a quasi-judicial agency, has the authority to issue injunctive relief to preserve the status quo, and to protect the fruits of an appeal before it. See Boise Cascade Corporation v. Washington Toxics Coalition, 68 Wn. App. 447, 453-54, ___ P.2d ___ (1993)(holding that the Administrative Procedure Act confers authority upon the Forest Practices Appeals Board to issue stays to protect the status quo).

VIII

Even though construction has proceeded since some time in December, 1992, none of the parties raised this fact, nor sought to include a request for a stay before the Board as an issue, in any of the pre-hearing conferences that preceded the hearing. Apparently Mr. Clifford had initiated an action in King County Superior Court, against Renton, to enjoin the construction; but the court denied the relief on the grounds that no public agency had joined the injunctive action, and because Mr. Clifford had failed to join Boeing as a defendant.

IX

This opinion, in no way is to be construed as suggesting that the Board was influenced to decide in favor of this project, by the ongoing construction. Unfortunately the construction may raise the erroneous perception that this was the case. However, to say that is not enough, we believe, to preserve the integrity of the Shoreline Management Act. None of the parties are beyond reproach for not seeking to redress this issue. Nevertheless, it is particularly disturbing that the public agencies entrusted with enforcement of the Shoreline Management Act, for whatever reason disregarded the procedural protections of the Act.

ROBERT V. JENSEN, Attorney Member

HAROLD S. ZIMMERMAN, Chairman

ANNETTE S. McGEE, Member

BOBBI KREBS-McMULLEN, Member

ROBERT C. SCHOFIELD, Member by 24

MARK ERICKSON, Member

Bobbi Krebs-McMullen
DISSENTING OPINION:

I concur with the majority opinion save for my dissent in its interpretation of Section 7.08 of the RSMP at p. 31 as it applies to landfill.

Said section reads as follows:

Landfill

Landfills shall be permitted in the following cases:

A. For detached single family residential uses, when the property is located between two (2) existing bulkheads, the property may be filled to the line of conformity provided the fill does not exceed one hundred twenty-five (125) feet in length along the water's edge and thirty-five (35) feet into the water, and provided the provisions of Section 8.02.02 through 8.02.05 are satisfactorily met; or,

B When a bulkhead is built to protect the existing perimeter land, a landfill shall be approved to bring the contour up to the desired grade; or,

C. When in a public use area, landfill would be advantageous to the general public; or,

D. When repairs or modifications are required for existing bulkheads and fill; or,

E. When landfill is required for flood control purposes; or,

F. Justification for landfill for any other purpose than those listed in subsections A through E above will be allowed only with prior approval of the Land Use Hearing Examiner.

Each item within said section is related to private residences or the protection or public enjoyment of state shorelines. The only logical reason for a residence to ask for landfill would be to prevent flooding of the house. The landfill would obviously be used to raise the house above the 100 year flood level. This is a reasonable exemption. No exemption for commercial projects is specifically itemized

The majority urges that one first assume the project being permitted is followed by the use of landfill to protect it against flooding. Here, the protection is primarily by means of raising the level of the building and parking lot above flood stage--as with a residence. This is a bootstrapping argument which allows landfill for any construction purpose.

The City of Renton, by specifying a single type of building (a single family residence) has in essence asked for government scrutiny of other types of construction that would require landfill. Approval by the Land Use Hearing Examiner satisfies the intent of the SMA in "preventing unrestricted construction" while "protecting private property rights consistent with the public interest."

It is my opinion that 7.08 E is a provision to allow landfill for the purpose of flood control not an open invitation to allow construction of any type (other than a single family residence) in shoreline areas without special review. Because the majority of the proposed landfill does not fall within any of the exemptions in 7.08, this application should have been considered by the Renton Land Use Hearing Examiner.

BOBBI KREBS-McMULLEN

BEFORE THE SHORELINES HEARINGS BOARD
OF THE STATE OF WASHINGTON

ORIGINAL

CHRISTOPHER P. CLIFFORD, A.C.R.E.S., and COLLEEN COLE-BOWRON, Appellants, v. **THE CITY OF RENTON and THE BOEING COMPANY,** Respondents. and **STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,** Respondent-Intervenor.	**SHB 92-52 and 92-53** **ORDER GRANTING SUMMARY JUDGMENT CONCERNING COMPLIANCE WITH THE STATE ENVIRONMENTAL POLICY ACT**

Motions for partial summary judgment were argued on Wednesday, February 3, 1993. The Board entered an Order Granting and Denying Summary Judgment. Under paragraphs XXI, on page 10, through XXIX, on page 15 of the Order, this Board discussed compliance with SEPA and concluded that the City should provide "**...certificates of posting and publishing proving compliance with notice requirements of its SEPA ordinance...**". The Board further stated "**If there is no genuine issue of material fact concerning the City's compliance with SEPA notice requirements, summary judgment should be granted for respondents on issue no. 12 of the**

WARREN, KELLOGG, BARBER, DEAN & FONTES, P.S.
ATTORNEYS AT LAW
POST OFFICE BOX 626 • 100 SOUTH SECOND STREET
RENTON, WASHINGTON 98057
(206) 255-8678

Pre-Hearing Order and issues no. 10 and 11 should be stricken." The City of Renton, by filing on February 17, 1993, provided the Board with certificates of posting and publishing which show compliance with Renton's SEPA ordinance.

NOW, THEREFORE, IT IS HEREBY ORDERED that summary judgment is granted for Respondents on issue no. 12 of the Pre-Hearing Order and issues nos. 10 and 11 are stricken.

DONE at Lacey, WA, this 29th day of ~~February~~ March, 1993.

William A. Harrison
HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

SHORELINES HEARINGS BOARD

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

Annette S. McGee
ANNETTE S. McGEE, Member

Robert V. Jensen
ROBERT V. JENSEN, Attorney Member

Bobbin Lewis-McMullen
~~NANCY BURNETT,~~ Member

Mark Erickson
MARK ERICKSON, Member

Robert C. Schofield
ROBERT C. SCHOFIELD, Member

3.16:23:as.

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BEFORE THE SHORELINES HEARINGS BOARD
OF THE STATE OF WASHINGTON

ORIGINAL

CHRISTOPHER P. CLIFFORD, A.C.R.E.S., and COLLEEN COLE-BOWRON, Appellants, v. **THE CITY OF RENTON and THE BOEING COMPANY,** Respondents. and **STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,** Respondent-Intervenor.	**SHB 92-52 and 92-53** **ORDER GRANTING SUMMARY JUDGMENT CONCERNING COMPLIANCE WITH THE STATE ENVIRONMENTAL POLICY ACT**

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DONE at Lacey, WA, this 29th day of ~~February~~ March, 1993.

William A. Harrison
HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

SHORELINES HEARINGS BOARD

Harold S. Zimmerman
HAROLD S. ZIMMERMAN, Chairman

Annette S. McGee
ANNETTE S. McGEE, Member

ROBERT V. JENSEN, Attorney Member

~~NANCY BURNETT,~~ Member

Mark Erickson
MARK ERICKSON, Member

Robert C. Schofield
ROBERT C. SCHOFIELD, Member

3.16:23:as.

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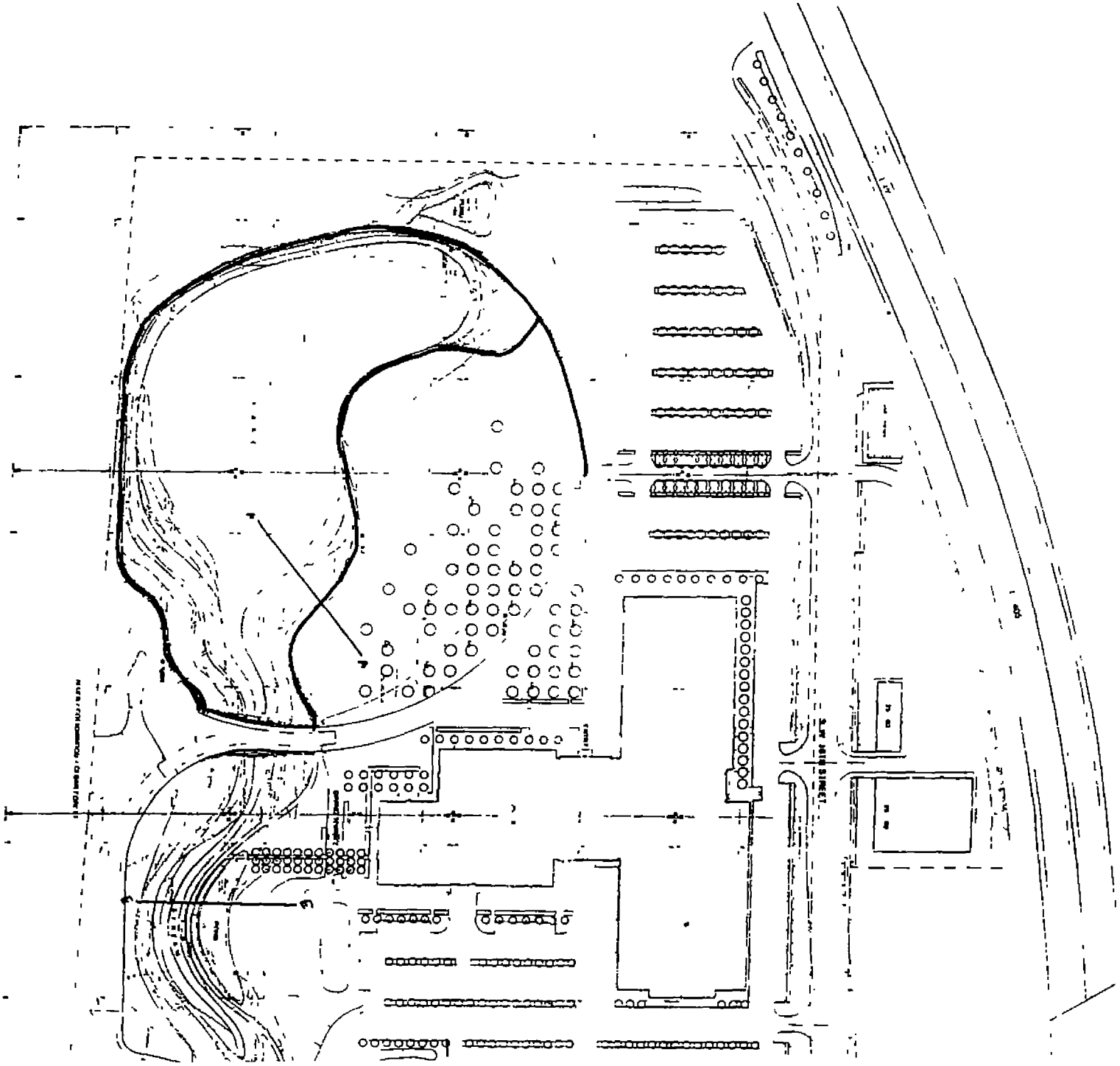

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CHRISTOPHER CLIFFORD; A.C.R.E.S.; and COLLEEN COLE-BOWRON,	)	
Appellants,	)	**SHB NOS. 92-52 and 92-53**
v.	)	**ORDER CLARIFYING STAY**
CITY OF RENTON; THE BOEING COMPANY; and STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	
Respondents.	)	

I

The Shorelines Hearings Board ("Board") convened a telephonic conference at approximately 3:15 p.m., on Wednesday, May 19, 1993, in response to the Boeing Company's ("Boeing") request for clarification of the Board's Order Granting Stay, dated: May 18, 1993. Boeing's request was in the form of a letter to the Board, dated: May 19, 1993. Copies had been sent to the parties.

II

Participating Board members were: Robert V. Jensen, presiding; Harold S. Zimmerman, Chairman; and members Richard C. Kelley, Bobbi Krebs-McMullen, Robert C. Schofield and Mark Erickson.

III

Representing the parties were: Attorney Richard E. McCann for Boeing; Lawrence J. Warren, Attorney at Law, for the City of Renton ("Renton"); and Roger M. Leed, Attorney at Law, for A.C.R.E.S. and Colleen Cole-Bowron. Christopher Clifford could not be reached

and did not appear. The attorney for the Department of Ecology was unavailable for the conference.

IV

Boeing requested clarification as to whether seven specific items related to shutting down the construction were barred by the May 18 stay order.

V

Only two items were actually disputed. The first of these was a proposal to bring a 70 ton transformer onto the site, which was in the process of delivery, for the purpose of storage. Boeing explained that it did not intend to affix the transformer to the site, or to hook it up to electric power, but rather desired to place it on an existing concrete pad, on Monday, May 24, 1993.

VI

The second proposal which was challenged by appellants was the proposal to fill a 20 foot wide, by 70 foot long, by 9 foot deep excavated trench containing electrical conduit, exposed reinforcing steel and concrete forms, with approximately 5 feet of concrete, topped by about 4 feet of dirt. The basic reason Boeing desires to fill this trench is for protection against accidents. Renton indicated that an alternate solution, such as a cover, might be not allowed under the Building Code.

VII

Appellants argued that the filling of this trench was not necessary, and due to the size of the filling, that this activity would have adverse effects to the environment.

VIII

The Board concludes that the location of the transformer on the site, with the minimal cover necessary to securely protect it from the elements would not be inconsistent with the Board's May 18, order.

IX

We conclude that the filling of the trench would constitute construction, but would not be inconsistent with the May 18 order. The activity will occur underground and will not by itself create any significant environmental harm. Moreover, the filling appears to be the only practical and safe solution to a potentially dangerous site condition.

X

Based on the foregoing, the Board issues this

ORDER

1. Items 1,3, and 5-7 of Boeing's May 19, 1993 letter do not constitute construction, and therefore are not barred by this Board's May 18, 1993 Order Granting Stay.

2. Item 2, with the minimum cover necessary to protect the transformer securely from the elements, is not inconsistent with the May 18, order, and will be allowed by this order.

3. Item 4, although it constitutes construction, will be allowed to proceed as specified in Boeing's letter, in order to provide adequate protection against the risk of harm to human safety

4. A copy of Boeing's May 19 letter is attached hereto for reference by the parties.

DONE at Lacey, WA, this 21st day of May, 1993.

SHORELINES HEARINGS BOARD

HAROLD S. ZIMMERMAN, Chairman

ROBERT V. JENSEN, Attorney Member

RICHARD C. KELLEY, Member

BOBBI KREBS McMULLEN, Member

ROBERT C. SCHOFIELD, Member

MARK ERICKSON, Member

Perkins Coie
1201 Third Avenue, 40th Floor
Seattle, WA 98101

May 19, 1993

Honorable William A. Harrison
Shorelines Hearings Board
Environmental Hearings Office
4224 6th Avenue SE
Bldg. 2, Rowe 6
Lacey, WA 98504-0903

Subject: Request for Clarification of Board Order of May 18, 1993

Dear Judge Harrison:

Effective upon the Board's Order of May 18, 1993 at 4:30 pm, The Boeing Company has ordered construction to cease on the CSTC. Construction will not resume until authorized by Order of the King County Superior Court.

Cessation of construction, however, raises a number of health, safety and public protection issues which require clarification from the Board to effect a safe stoppage of work.

Specifically:

1. Can equipment and material now on the site be removed to prevent damage, loss and vandalism?

2. Can construction materials and equipment presently in transit to the site be accepted and stored on the site? This would include, for example, one 70 ton transformer that has been in route for 3 weeks and is scheduled to arrive on the site on Friday, May 21, 1993. It would be placed on an existing concrete pad for storage on Monday, May 24, 1993. Transportation, unloading, and protection of this transformer require special handling and equipment.

3. Can dewatering of excavated areas be continued to maintain the status quo pending Superior Court resolution of the stay?

4. Can excavated areas be filled? For example, one trench, approximately 9' deep, 20' wide and 70' long has had conduit and concrete forms installed with exposed reinforcing steel. Left in its present condition, it presents a potential hazard. The duct bank was scheduled to be filled with concrete today, May 19, 1993. That pour has been delayed pending Board clarification of permissible activity. The hazard can be eliminated by pouring the concrete and backfilling the trench with earth.

5. Can erosion control activities continue? This involves maintenance of silt fencing, and the temporary erosion and sedimentation control ponds to meet storm water quality runoff requirements, as required by King County and Renton ordinances?

6. A utility tunnel under SW 16th Street has been installed and is open at one end. As such, it presents a potential danger. Can it be secured with barricades?

7. Can the site be secured by installing barricades, fences and weather proof enclosures around equipment and materials?

The Board's clarification of these issues and specific instructions with respect to permissible activities is urgently needed to avoid injury to the environment, property and the public.

A telephone conference with the Board and all parties is requested as soon as possible, preferably today, to address these issues.

Sincerely,

Laura N Whitaker

for Richard E. McCann

cc: Roger M. Leed, Esq.
Christopher P. Clifford
Lawrence J. Warren, Esq.
Mark Jobson, Esq.
K-Y Su

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

CHRISTOPHER CLIFFORD, A.C.R.E.S. and COLLEEN COLE-BOWRON, Appellants, v. CITY OF RENTON and THE BOEING COMPANY, Respondents.	SHB 92-52 and 92-53 ORDER DENYING MOTIONS RE: STANDING, FILING AND SERVICE, AND SHORELINES

On December 10, 1992, the City of Renton filed its Motion and Brief to dismiss these appeals. On December 15, 1992, the Boeing Company filed its Motions to Dismiss.

On January 8, 1993, ACRES and Cole-Bowron filed its response. On January 8, 1993, Clifford filed his response. Intervenor, Department of Ecology filed its response on January 7, 1993

On January 11, 1993, the Boeing Company filed its reply.

Oral argument was heard on January 13, 1993.

Having considered the above together with the affidavits, declarations and attachments, and the record and file herein, and being fully advised, we rule as follows:

STANDING

I.

The Shoreline Management Act (SMA) provides, in pertinent part:

> "Any person aggrieved by the granting, denying, or rescinding of a permit on shorelines of the state pursuant to RCW 90.58 140 may seek review from the shorelines hearings board by filing a request for the same within thirty days of the date of filing as defined in RCW 90 58.140(6). (emphasis added.)
> RCW 90 58.180

The same "person aggrieved" standard governs review of SEPA issues. RCW 43.21C.075(4).

II

Standing under the "person aggrieved" formulation of the SMA and SEPA requires injury in fact to interests arguably within the zone of interests protected by the statutes involved. See United States v. SCRAP, 412 U S. 669 (1973); Sierra Club v Morton, 405 U.S. 727 (1972), and the Board's prior decision in Deatley v Yakima County, SHB No 89-3 (1989); Foulks v King County, SHB No 80-17 (1980) and Hildahl v Steilacoom, SHB 80-33 (1980).

III

We note at the outset that pursuant to the SMA, at RCW 90.58.180, the Attorney General and the Department of Ecology have each certified to this Board that all appellants herein have "valid reasons to seek review" from this Board. As held in Deatley and Foulks, supra, we do not view this certification as conclusive of standing. We do, however, view it as tending to show standing. We will consider this certification among other factors in reaching a conclusion on standing

IV

The other factors pertinent to standing appear in the filings on this motion. Among these are:

A) Declaration of Colleen Cole-Bowron, which states:

> 1) My name is Colleen Cole-Bowron and I reside at 601 Cedar Avenue South in Renton, Washington, together with my husband. I have resided in the state of Washington for forty-two (42) years. I was educated in Renton, Washington, at Renton High School, and I attended Seattle Dental Assistant School, Renton Vocational College and Seattle University.
> 2) Longacres Racetrack, to my personal experience, is a vital natural resource Much of the racetrack, particularly the infield, represents wetlands that I have personally observed being inundated with wildlife during the wetter times of year. Many types of wildlife use the Longacres Racetrack area, including the area which is the subject of Boeing's Customer Service Training Center proposal for feeding and nesting. I have seen many, many waterfowl consistently over the years occupying the racetrack infield, backside, and along Springbrook Creek, particularly during the winters months . . .

3) . . . A.C.R.E.S. was formed by myself and other concerned Renton citizens . . .

B) Declaration of David Scott Israel which states:

1) Longacres Racetrack has existed for almost 60 years in harmony with the wetlands and wildlife. Longacres is where I go to collect my thoughts with poplars and Mt. Rainier as my backdrop. In cold winter mornings when the leaves are gone from the trees, I have observed (and look forward to it) hawks which are easily visible perched on the trees, just above and along Springbrook Creek . . . On occasion I have climbed down to the banks of Springbrook to enjoy and explore the vegetation and wildlife.

2) A.C.R.E.S. is a non-profit organization, the purpose of which is to protect and enhance the natural, historical, scenic, wetlands and environmental values of Longacres Racetrack and associated areas. For those reasons A.C.R.E.S. decided to become a party to this appeal

C Declaration of Sally Leona Steiner which states:

1) During the time that this issue was before the City, A.C.R.E.S. was formed and I participated.

2) Over many years, I and members of my family have used Springbrook Creek and its banks for recreation. We have walked along the creek, fished in it, picnicked on its banks, listening to the birds sing.

D. Response of Christopher Clifford which states:

1) Mr. Clifford owns property within one quarter mile of the proposed project Mr. Clifford's property is directly impacted by any substantial development and reduction in the flood plain area that effects the valley floor area east of the green river.

2) Mr. Clifford's home views the proposed project site.

Respondent The Boeing Company, cites Lujan v. National Wildlife Federation, 497 U.S. 871, 110 S. Ct. 3177, 3186 (1990) for the proposition that persons seeking to be heard must allege use of the precise land at issue. The underscored portions of the foregoing allegations show compliance with that requirement.

V.

The factual allegations by the appellants are comparable to those is Deatley, supra, (Order Granting Motion to Dismiss reversed Thurston County Superior Court No. 89-2-01362-0, 1990), and Foulks, supra. In Deatley the appellant alleged that:

"I, my wife and children all utilize and enjoy the Greenway facilities."

The reference to Greenway is to the shoreline of the Yakima River. In Foulks, the appellant alleged that.

"She has personally picked from the Downey farm which is crossed by the proposed highway development."

In both these cases standing was sustained.

VI

The sum total of the allegations herein show that appellants seek to protect land use and environmental interests which are within the zone of interests protected by the SMA and SEPA If proven, these allegations would show injury in fact to the appellants. Under United States v S C R.A P , supra, and the other cases cited, all appellants have demonstrated standing to seek review from this Board of the permit at issue.

VII.

We are cognizant that appellants have also asserted interests not within the zone of the SMA and SEPA, namely, the use of the site for horse racing. The decision by The Boeing Company to end horse racing is not at issue here. Having shown a personal stake in shoreline interests, however, we do not deem the appellant's other interests to deprive them of standing to be heard on the shoreline issues.

VIII.

The motions to dismiss for lack of standing should be denied.

FILING AND SERVICE

I.

Respondents, the City of Renton and The Boeing Company, urge that the Board lacks jurisdiction over these requests for review because of untimely service of the appeals by appellants. We disagree.

II.

The Board's jurisdiction is set forth at RCW 90.58.180(1) which states in pertinent part:

> Any person aggrieved by the granting, denying or rescinding of a permit on shorelines of the state pursuant to RCW 90.58.140 may seek review from the shorelines hearings board by filing a request for the same . days of the date of filing as defined in RCW 90.58.140(6).
>
> Concurrently with the filing of any request for review with the board as provided in this section pertaining to a final order of a local government, the requestor shall file a copy of his request with the department and the attorney general. (Emphasis added.)

The term "department" means Department of Ecology. RCW 90.58.030(1)(a).

III.

In this case, the "date of filing" which commences the thirty day period for appeal was October 13, 1992. The thirtieth and final day for appeal was November 12, 1992. On November 12, 1992, appellants filed their appeals as follows according to respondents' allegations:

	ACRES	Clifford
Shorelines Hearings Board	4:55 pm	4:15 pm
Department of Ecology	5:05 pm	3:40 pm
Attorney General	5:10 pm	5:00 pm

IV.

Applying the jurisdictional requirements of RCW 90.58.180(1) to the above facts, all appellants have filed their request for review with this Board within 30 days. The filings with Ecology and the Attorney General are disputed with regard to the exact time of day. These disputes do not raise genuine issues of material fact, however, because even the facts as alleged by respondents show that appellants have met the requirement of RCW 90.58.180(1) for concurrent filing with Ecology and the Attorney General.

V.

The term "file" means "received". WAC 461-08-070. There is no rule among our rules of procedure, chapter 461-08 WAC, prohibiting filing by telefacsimile as was used by appellants here.

VI.

All appellants have timely filed their appeals, thus vesting the Board with jurisdiction under RCW 90.58.180(1).

VII.

Respondents, Renton and Boeing cite our rule of procedure, WAC 461-08-065(2), in the context of jurisdiction. That rule states:

> 1) A copy of the request provided for in WAC 461-08-055 shall be filed concurrently by requestor with the department of ecology and the office of the attorney general. A copy of the request shall also be filed with the appropriate local government unit.
>
> 2) When the requestor is not the permit applicant, the requestor shall mail to the permit applicant a copy of the request for review and any amendments thereto.

Respondents urge that this rule sets up a requirement for filing appeals with the local government and the permit applicant within thirty days of the permit's "date of filing". Yet nothing in our rule specifies a thirty day limit for filing or serving appeals on local government or the permit applicant. Nor does our rule impose any jurisdictional requirements beyond filing here and concurrently with Ecology and the Attorney General pursuant to RCW 90.58.180(1). There is no jurisdictional requirement for filing or service of an appeal with the permit applicant within thirty days. Foulks v Department of Transportation, SHB No. 80-17 (Denial of Motion, 1980). The same is true for filing or service upon local government.

IX.

Had the legislature intended that filing or service of an appeal upon a local government be within thirty days, it would have said so expressly as it did elsewhere in the SMA at

RCW 90 58.180(2).

> The department or the attorney general may obtain review of any final order granting a permit, or granting or denying an application for a permit issued by local government by filing a written request with the shorelines hearings board and the appropriate local government within thirty days from the date the final order was filed as provided in RCW 90 58 140(6). (Emphasis added.)

The same is true in statutes governing appeals to the Pollution Control Hearings Board as in Avery v. Spokane County Air Pollution Control Authority, PCHB No. 91-74 (1991) cited by respondent, Boeing. The statute governing appeals to the Pollution Board expressly requires service on the municipal air pollution control agency "within the time specified herein" (30 days). RCW 43.21B.230.

X

Competent persons associated with both Renton and Boeing were served with these appeals simultaneously with filings here. Neither the City or Boeing contend that they have no copy of these appeals, only that specified City or Boeing officials did not receive the appeal copies within thirty days. There being no thirty day requirement in this regard, all that is required is service upon the City and Boeing within a reasonable time so as to avoid undue prejudice. Appellants have met that burden here, and successfully served both the local government and permit applicant.

XI.

We have carefully considered the other contentions of the respondents with regard to filing and service and find these to be without merit.

XII.

Appellants have filed and served their appeals so as to invoke the jurisdiction of this Board in these matters. The motions to dismiss for lack of filing and service should be denied

SHORELINES

I

Respondent the Boeing Company, urges that the Board lacks jurisdiction over these matters as the water course at issue, Springbrook Creek, is not a "shoreline" under the Shoreline Management Act. Alternatively, Boeing contends that if it is a shoreline, a shoreline permit is not required for substantial development there. We disagree with both assertions.

II.

The Shorelines Management Act defines "shorelines" at RCW 90.58.030(2)(d) as.

> . . . all of the water areas of the state, including reservoirs, and their associated wetlands, together with the lands underlying them; except (i) shorelines of statewide significance; (ii) shorelines on segments of streams upstream of a point where the mean annual flow is twenty cubic feet, per second or less and the wetlands associated with such upstream segments; and (iii) shorelines on lakes less than twenty acres in size and wetlands associated with such small lakes. (Emphasis added.)

Thus streams are "shorelines" unless the mean annual flow is twenty cubic feet per second or less.

III.

Pursuant to its authority at RCW 90.58.200 to adopt rules "as are necessary and appropriate to carry out" the SMA, Ecology has, by rule, listed shorelines at chapter 173-18 WAC. Ecology stipulates that its rules are underinclusive with regard to Springbrook Creek. The key characteristic of 20 CFS mean annual flow was found by Ecology to take in approximately two miles more of the Creek than stated in the rule, WAC 173-18-210(57). (Ecology's Response, p. 4). Thus the segment of Springbrook Creek at issue is deemed by Ecology to be a shoreline. (Ecology's Response, Exhibit B).

IV.

Boeing, on this motion, does not contest the stream flow of Springbrook Creek, per se Rather, it contends that Ecology's failure to amend its rules, chapter 173-18 WAC, prevents

the Creek from being a "shoreline". (Boeing's Reply, pp. 22-23) This contention lacks merit for two reasons.

First, Ecology's chapter 173-18 WAC provides:

> [i]n the event that any of the designations set forth in this chapter conflict with the criteria set forth in RCW 90.58.030(2) or in WAC 173-18-040 the criteria shall control. The designation of the stream or river shall be governed by the criteria.
> WAC 173-18-046

It is Ecology's interpretation of its own rule that, in effect, "reality governs". We concur with this interpretation and sustain it here.

Second, even were Ecology to lack a rule like the foregoing WAC 173-18-046, above, reality would still govern. Where, by the terms of the SMA a certain water body is a shoreline, the rulemaking process cannot make it otherwise. Ecology is without authority, by rule making, to vary the terms of the SMA. The principal effect of WAC 173-18-046 is to state this expressly though it would be so in any event by operation of law. This Board has previously ruled that shorelines meeting the SMA criteria are shorelines, Ecology's regulations aside. Massey v. Island County, SHB No. 80-3 (Interim Findings, Conclusions and Order, 1980). We have often exercised review to assure that the application of shoreline regulations or master programs, to permit actions is consistent with the dictates of the SMA itself. Hastings v. Island County, SHB No. 86-27 (1988), Risk v. Island County, SHB No. 86-49 (1987), Friends of [illegible] -57 (1986), Citizens for Orderly Growth v. Skagit County, SHB No. 84-17 (1985), Save a Valuable Environment v. City of Bothell, SHB No. 81-27 (1982), see also D/O Center v. Ecology, 119 Wn.2d 761 (1992). Where the application of regulations would conflict with the SMA, the terms of the SMA must govern. The Board does not lack jurisdiction over the portion of Springbrook Creek at issue solely because it is not listed in Ecology regulations or the Renton Shoreline Master Program.

V.

Under RCW 90.58.140(2) of the SMA:

> A substantial development shall not be undertaken on shorelines of the state without first obtaining a permit from the government entity having administrative jurisdiction under this chapter.

Boeing's contention that a shoreline permit is not required for the development is therefore without merit if the development is substantial and occurs upon a shoreline as defined in the SMA at RCW 90.58.030.

VI.

The Board is not deprived of jurisdiction over the permits appealed solely because this part of Springbrook Creek is not listed in Ecology regulations or the Renton Shoreline Master Program. If the stream characteristics show it to be a statutory shoreline and if substantial development is proposed, a shoreline permit is required. Respondent, Boeing's, motion on these points should be denied.

From which we enter the following:

ORDER

Respondents' motions to dismiss based upon standing, filing and service, and shorelines are each denied.

Done this 22nd day of January, 1993.

William A. Harrison

HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

SHORELINES HEARINGS BOARD

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I concur in the Board's rulings on summary judgement in regard to: 1) consideration of Renton's wetland ordinance which is not part of its master program; 2) the State Environmental Policy Act (SEPA) procedural issues; 3) and the issue of water-dependency. I dissent, however, on the ruling pertaining to the failure of Renton to give adequate public notice of a shoreline hearing; and on the decision not to remand the permit application back to the City of Renton for an alleged failure to designate Springbrook, adjacent to the site.

PUBLIC NOTICE

The Shoreline Management Act ("Act") is to be liberally construed on behalf of its purposes. RCW 90.58.900; Clam Shacks v. Skagit County, 109 Wn.2d 91, 93, 97, 743 P.2d 265 (1987). Concomitantly, exceptions to its prescriptions must be strictly construed. See Mead School Dist. v. Mead Education, 85 Wn.2d 140, 145, 530 P.2d 302 (1975) (holding that the liberal construction command of the Open Public Meetings Act implies an intent that the act's exceptions be narrowly confined).

The Act mandates local governments to "actively encourage participation by all persons and private groups showing an interest in shoreline management programs," both in their development and implementation. RCW 90.58.130 and RCW 90.58.130(1).

Public hearings on shoreline permits are optional with local government. However, if a public hearing is to be held, the Act requires that:

> notices of such a hearing shall include a statement that any person may submit oral or written comments on an application at the hearing.

RCW 90.58.140(4)(b). This requirement is repeated in WAC 173-14-070(3).

This Board has previously held that a shoreline permit granted without following the notice procedures set out in RCW 90.58.140(4) and WAC 173-14-070, is invalid. Save Flounder Bay v. Harold W. Mousel, SHB NO. 81-15 (1982). Save Flounder Bay is the Board's seminal case on this matter. That case dealt with the failure of Anacortes to properly post the project vicinity with the appropriate notices. It did not consider the precise requirement here; namely to require a proper notice in the event a public hearing is held, but the reasoning of the decision is applicable here.

First, the Board held, the notices required by RCW 90.58.140(4)(b) are substantial mandatory provisions of the Act. They are not mere technicalities. Save Flounder Bay, at 20.

Secondly, the Board concluded that the failure to post the property

> was a serious omission, because had the notice been given it is quite likely that more persons would have expressed their views in writing at an early stage in the

> proceedings, and it is also possible that these views might have influenced the environmental officer and the planning commission to arrive at a different decision on some of the key issues.

Id. at 21.

There is no dispute that the City of Renton ("Renton") properly published notice of the application for a shoreline permit in February, 1992; nor is there any contention that the applicant did not post a similar notice on the property, in compliance with the Act's requirements. However, the notice that was published in the Valley Daily News (advertising the public hearing to be held May 19, 1992) stated that the hearing was for the purpose of considering The Boeing Company's ("Boeing") petition for site plan approval for its proposed Customer Service Training Center ("CSTC"). No mention was made in the notice that this would be a hearing on an application for a shoreline permit.

The implications of this defect are not minor, in the context of the Save Flounder Bay, decision. The public hearings held by Renton's Hearing Examiner, were held, beginning at 9:00 a.m. during the work week. Even people with adequate notice could be expected to have difficulty attending a public hearing held during working hours.

As government regulation of land use becomes more complex, there is a tendency for government to compartmentalize various aspects of the decision-making process. This tendency resulted in this case, in the City Attorney and the City Council overruling the Hearing Examiner's

decision that he had held a public hearing on the shoreline questions pertaining to the CSTC project. Renton, in making this decision, appears to have done so to avoid sending out a new notice and holding a public hearing as a result of the corrected notice. Renton argues that it never intended to hold a public hearing on the shoreline questions. Indeed, Renton and Boeing contend that the Hearing Examiner had no authority to hold such a hearing.

Their argument is unpersuasive for two reasons. The Hearing Examiner did the right thing by combining the site plan and shoreline hearings. That action was consistent with the Act's proscription of "uncoordinated and piecemeal development of the state's shorelines". RCW 90.58.020. Unfortunately, the public hearing notice failed to convey that message. It gave the distinct impression that site plan review was not related to shoreline review.

Renton's conclusion that it did not hold a public hearing on the shoreline issues should lead to the conclusion that it was a nullity. However, that is not the way it was treated by the City Council. Except for one minor change, not relevant here, the Council affirmed in its entirety, the findings and decision of the Hearing Examiner. Renton City Council Minutes, at 463-65. As far as the record shows, the testimony at the public hearing comprised the public comment upon which Renton relied to grant the shoreline permit. Renton cannot logically argue, on the one hand, that it held no public hearing, and on the other, use the fruits of the public hearing to support its

ultimate shoreline decision.

Had the public been properly notified of the scope of the public hearing, to include shoreline issues, greater public attention could have been focused on that issue. Conceivably the position of the parties before the Board could have been reversed, with Renton and Boeing having the burden of proof on the substantive shoreline issued. See Save Flounder Bay, at 23.

The fact that the appealing parties appeared at the public hearing and testified does not waive their right to object to the adequacy of the notice. "All citizens are entitled to the notice required and an opportunity to be heard after it has been given." Id. at 29.

In a subsequent case, interpreting Save Flounder Bay, the Board ruled that the notice issue raises two questions. First, was the notice requirement substantially complied with? Secondly, if not, did prejudice result? The prejudice that may be shown, is not confined to that which may be suffered by an appellant before the Board; rather, it may be shown on the Board's record that third-persons were prejudiced by failure to receive the requisite notice. Strand v. Snohomish County, SHB NO. 85-4 (1985).

There was no substantial compliance with the notice requirement for the public hearing; therefore it is not necessary to reach the second question.

SHORELINE DESIGNATION

There can be no doubt that neither Renton, nor Ecology actually considered, in approving Renton's Master Program, any shoreline designation for the protion of Springbrook Creek adjacent to the CSTC project. That portion of the creek was not, at the time, considered by either agency to constitute a shoreline of the state. The Shoreline Management Act confers a positive duty upon the appropriate governing bodies to classify shoreline uses for the various shorelines within their jurisdiction. RCW 90.58.100(1). This provision has been interpreted by Ecology, in its shoreline guidelines as requiring the designation of shoreline environments based on uses.

> In order to plan and effectively manage shoreline resources, a system of categorizing shoreline areas is required for use by local governments in the preparation of master programs. The system is designed to provide a uniform basis for applying policies and use regulations within distinctively different shoreline areas. To accomplish this, the environmental designation to be given any specific area is to be based on the existing development pattern, the biophysical capabilities and limitations of the shoreline being considered for development and the goals and aspirations of local citizenry (emphasis added).

WAC 173-16-040(4).

The fact that the site, in its historic use as a racetrack, has had a passive impact on the shoreline and adjacent wetland, renders it especially important that very careful review be done of any major

change in use of the site that could have a different impact on the shoreline environment. Yet, because of the catchall phrase in its master program, Renton now argues that it is not required to undergo a systematic review of this shoreline area, prior to considering whether the project is consistent with the Act and the master program. The logical conclusion of that argument is that the site has been properly designated as an urban environment; and therefore, is subject to whatever environmental and use restrictions accompany such a designation.

This argument flies in the face of the clarion call in the Act for

> a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines (emphasis added).

RCW 90.58.020.

Renton and Boeing contend that Section 5.04.03 of the Renton Master Program ("RMP"), properly classifies the Springbrook Creek shoreline in question by default. I respectfully submit that the argument tortures the Act to reach a specific result in this case By its own terms, Springbrook Creek was not considered to be a shoreline of Renton, at the time that this master program provision was adopted. The RMP is to be interpreted in a way that makes it consistent with the

policies of the Shoreline Management Act and the accompanying regulations. RCW 90.58.090(1). Additionally, the RMP, like the Act, is subject to the mandate that it be interpreted liberally on behalf of the objectives and purposes of the Act. RCW 90.58.900.

I believe that Renton lawfully has two alternatives. It may reconsider the proposal under the policy of RCW 90.58.020 and either: 1) the guidelines of Ecology; or 2) an amended master program which encompasses all of the shorelines of Springbrook Creek, lying within the city of Renton. Charles L. Welchko v. City of Anacortes, SHB NOS. 79-45, 47, 49 & 51 (1980).

ROBERT V. JENSEN, Attorney Member